

NORTH CAROLINA
COURT OF APPEALS
REPORTS

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This volume is printed on permanent, acid-free paper in compliance
with the North Carolina General Statutes.

**THE COURT OF APPEALS
OF
NORTH CAROLINA**

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SIDNEY S. EAGLES, JR.

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RALPH A. WALKER

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CLARENCE E. HORTON, JR.
ROBERT C. HUNTER
ROBERT H. EDMUND, JR.²

Emergency Recalled Judge
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Former Chief Judges
R. A. HEDRICK
GERALD ARNOLD

Former Judges

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JAMES H. CARSON, JR.
JAMES M. BALEY, JR.
DAVID M. BRITT
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
RICHARD C. ERWIN
EDWARD B. CLARK
HARRY C. MARTIN
ROBERT M. MARTIN
CECIL J. HILL
E. MAURICE BRASWELL
WILLIS P. WHICHARD

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DONALD L. SMITH
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ALLYSON K. DUNCAN
EUGENE H. PHILLIPS
SARAH E. PARKER
HUGH A. WELLS
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
CLIFTON E. JOHNSON
JACK COZORT
MARK D. MARTIN

Administrative Counsel
FRANCIS E. DAIL

Clerk
JOHN H. CONNELL

1. Appointed by Governor James B. Hunt, Jr. effective 5 January 1999.
2. Elected and sworn in 1 January 1999.

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Assistant Director

Robert C. Montgomery

Staff Attorneys

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Shelley J. Lucas

Brenda D. Gibson

Audrey L. Cooper

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Judge Gerald Arnold³

Assistant Director

Alan D. Briggs⁴

APPELLATE DIVISION REPORTER

Ralph A. White, Jr.

ASSISTANT APPELLATE DIVISION REPORTER

H. James Hutcheson

3. Appointed by Chief Justice Mitchell effective 8 February 1999 to replace Dallas A. Cameron, Jr. who retired 1 February 1999.

4. Resigned effective 29 January 1999.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. RICHARD PARKER JERRY R. TILLETT	Manteo Manteo
2	WILLIAM C. GRIFFIN, JR.	Williamston
3A	W. RUSSELL DUKE, JR. CLIFTON W. EVERETT, JR.	Greenville Greenville
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4B	CHARLES H. HENRY	Jacksonville
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7B	G. K. BUTTERFIELD, JR.	Wilson
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8B	ARNOLD O. JONES ²	Goldsboro

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	STAFFORD G. BULLOCK	Raleigh
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14	ORLANDO F. HUDSON, JR. A. LEON STANBACK, JR. RONALD L. STEPHENS DAVID Q. LABARRE	Durham Durham Durham Durham
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15B	WADE BARBOUR	Pittsboro
16A	B. CRAIG ELLIS	Laurinburg
16B	DEXTER BROOKS ROBERT F. FLOYD, JR.	Pembroke Lumberton

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L. BRADFORD TILLERY ¹⁸	Wilmington

SPECIAL EMERGENCY JUDGE

DONALD L. SMITH	Raleigh
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-
1. Elected to the North Carolina Supreme Court and sworn in 1 January 1999.
 2. Elected and sworn in 4 January 1999 to replace Donald E. Jacobs who retired 31 January 1998.
 3. Retired 31 December 1998.
 4. Appointed and sworn in 19 March 1999.
 5. Elected and sworn in 25 November 1998.
 6. Elected and sworn in 4 January 1999 to replace H. W. Zimmerman, Jr. who retired 31 July 1998.
 7. Elected and sworn in 1 January 1999 to replace Julius A. Rousseau, Jr. who retired 31 December 1998.
 8. Elected and sworn in 1 January 1999 to replace Forrest A. Ferrell who retired 31 December 1998.
 9. Elected and sworn in 1 January 1999.
 10. Elected and sworn in 1 January 1999.
 11. Appointed and sworn in 1 April 1999 to replace Howard E. Manning, Jr. who was appointed and sworn in 19 March 1999 as Superior Court Judge District 10.
 12. Resigned 29 September 1998.
 13. Appointed and sworn in 7 January 1999.
 14. Appointed and sworn in 8 January 1999.
 15. Appointed and sworn in 4 January 1999.
 16. Appointed and sworn in 6 January 1999.
 17. Resigned 5 October 1998.
 18. Retired 31 December 1998.

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20	RONALD W. BURRIS (Chief) TANYA T. WALLACE SUSAN C. TAYLOR	Albemarle Rockingham Albemarle

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	MELISSA A. MAGEE	Gastonia
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	SHIRLEY H. BROWN	Asheville
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	DAVID KENNEDY FOX	Hendersonville
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WILLIAM M. CAMERON, JR. ²²	Jacksonville
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SOL G. CHERRY	Fayetteville
WILLIAM A. CREECH	Raleigh
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	MARGARET L. SHARPE	Winston-Salem
	KENNETH W. TURNER	Rose Hill

RETIRED/RECALLED JUDGES

ROBERT T. GASH	Brevard
NICHOLAS LONG ²⁷	Roanoke Rapids
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

-
- 1. Appointed and sworn in 26 March 1999.
 - 2. Elected and sworn in 1 December 1998 to replace L. W. Payne, Jr. who retired 30 November 1998.
 - 3. Appointed and sworn in 22 February 1999.
 - 4. Appointed and sworn in 25 February 1999.
 - 5. Elected and sworn in 7 December 1998.
 - 6. Appointed and sworn in 15 December 1998.
 - 7. Elected and sworn in 7 December 1998.
 - 8. Appointed and sworn in 7 December 1998 as Chief Judge to replace Robert W. Johnson who retired 1 December 1998.
 - 9. Elected and sworn in 7 December 1998.
 - 10. Elected and sworn in 7 December 1998.
 - 11. Elected and sworn in 7 December 1998.
 - 12. Appointed and sworn in 15 February 1999.
 - 13. Elected and sworn in 7 December 1998 to replace Michael E. Helms who became Superior Court Judge.
 - 14. Appointed Chief Judge 1 December 1998 to replace L. Oliver Noble, Jr. who was elected to Superior Court.
 - 15. Elected and sworn in 7 December 1998.
 - 16. Elected and sworn in 7 December 1998.
 - 17. Elected and sworn in 7 December 1998.
 - 18. Appointed and sworn in 29 January 1999 to replace Richard C. Boner who became a Superior Court Judge.
 - 19. Appointed and sworn in 1 January 1999 to replace J. Keaton Fonvielle who retired 31 December 1998.
 - 20. Appointed and sworn in 4 January 1999.
 - 21. Elected and sworn in 7 December 1998.
 - 22. Deceased 28 December 1998.
 - 23. Appointed and sworn in 4 January 1999.
 - 24. Appointed and sworn in 10 December 1998.
 - 25. Appointed and sworn in 3 December 1998.
 - 26. Appointed and sworn in 7 December 1998.
 - 27. Deceased 30 October 1998.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

MICHAEL F. EASLEY

*Deputy Attorney General
for Administration*
SUSAN RABON

*Special Counsel to the
Attorney General*
HAMPTON DELLINGER

*Deputy Attorney General for
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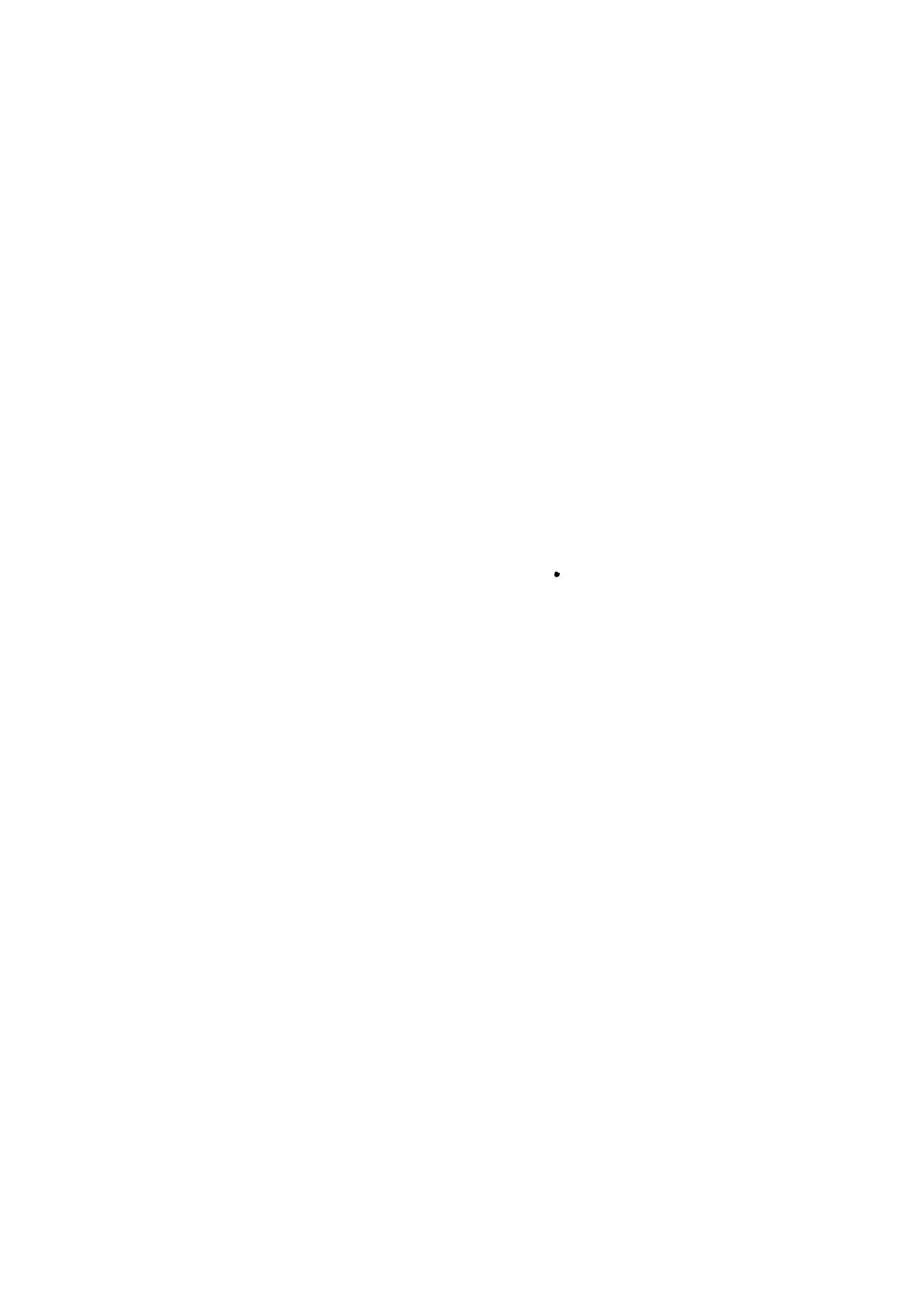
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ARGUED AND DETERMINED IN THE

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OF

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AT

RALEIGH

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA,
APPELLANT/RESPONDENT V. WILLIAM PEACE, APPELLEE/PETITIONER

No. COA95-678

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA,
APPELLEE/RESPONDENT V. WILLIAM H. PEACE, III, APPELLANT/PETITIONER

No. COA94-I283

(Filed 2 December 1997)

1. Administrative Law and Procedure § 9 (NCI4th); Labor and Employment § 120 (NCI4th)— Title VII retaliatory discharge claim—jurisdiction of OAH

The Office of Administrative Hearings (OAH) had jurisdiction to hear an ESC employee's claim for retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964 and did not act *ultra vires* in adjudicating such claim. The OAH does not function as a court in violation of N.C. Const. art. IV, § 1 when making final agency decisions on Title VII charges deferred from the Equal Employment Opportunity Commission. N.C.G.S. § 7A-759.

2. Labor and Employment § 121 (NCI4th)— Title VII claim—burden of proof

Plaintiff carries the initial burden of proof in Title VII retaliatory discharge cases. In order to make a *prima facie* showing

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of a Title VII retaliatory discharge, plaintiff must show that (1) he engaged in protected activity, (2) the employer took adverse employment action against plaintiff, and (3) a but for causal connection existed between the protected activity and the adverse action. If plaintiff presents a *prima facie* case of retaliation, defendant employer must articulate a legitimate nondiscriminatory reason for its action. If defendant employer shows a legitimate reason that overcomes the presumption of discrimination from plaintiff's *prima facie* showing, plaintiff then has to show that the reason was only a pretext for the retaliatory action.

3. Labor and Employment § 121 (NCI4th)— Title VII action—burden of proof

The Office of Administrative Hearings erred in placing the initial burden on defendant employer to show an absence of retaliatory purpose in a Title VII retaliatory discharge case prior to plaintiff employee's *prima facie* showing of a retaliatory discharge.

4. Public Officers and Employees § 66 (NCI4th)— state employee—continued employment—property interest—due process

A state employee had a property interest in continued employment created by N.C.G.S. § 126-35 and protected by the Due Process Clause of the United States Constitution.

5. Public Officers and Employees § 66 (NCI4th)— state employee—dismissal for just cause—burden of proof

The employer had the initial burden to produce evidence that a state employee was dismissed for "just cause," and the employee must then come forward with evidence that his or her dismissal was without "just cause."

6. Public Officers and Employees § 66 (NCI4th)— state employee—dismissal for just cause—burden on employee—due process

Placing the burden of proof on the state employee in determining whether the employee was dismissed for "just cause" within the purview of N.C.G.S. § 126-35 does not pose a substantial threat of erroneous termination and thus does not violate due process.

Judge GREENE dissenting in part.

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Appeal by Employment Security Commission from order entered 12 August 1994 in case 93 CVS 10599 by Judge Narley L. Cashwell in Wake County Superior Court, affirming a final order of the Office of Administrative Hearings reinstating Peace as an Equal Employment Opportunity Commission Officer based on retaliatory discharge. Appeal by Peace from an order entered 13 March 1995 in case 94 CVS 11517 by Judge Wiley F. Bowen in Wake County Superior Court, which order concluded that "just cause" existed for terminating Peace and reversed the State Personnel Commission's decision that Peace be reinstated. Both *Peace* appeals were thereafter consolidated and were originally heard in the Court of Appeals on 7 May 1996. See *Employment Security Comm. v. Peace*, 122 N.C. App. 313, 740 S.E.2d 63 (1996), *disc. review allowed and remanded*, 345 N.C. 640, 483 S.E.2d 706 (1997). Heard on grant of discretionary review in the Supreme Court on 11 June 1996. The cases *sub judice* were then remanded to this Court for reconsideration in light of the Supreme Court's ruling in *Soles v. The City of Raleigh Civil Service Comm.*, 345 N.C. 443, 480 S.E.2d 685, *reh'g denied*, 345 N.C. 761, 485 S.E.2d 299 (1997). Heard on remand in the Court of Appeals on 1 April 1997.

Attorney General Michael F. Easley, by Chief Deputy Attorney General Andrew A. Vanore, Jr., and Assistant Attorney General Valerie Bateman, for North Carolina Department of Justice; and Chief Counsel T.S. Whitaker and Attorney Fred R. Gamin, for North Carolina Employment Security Commission, respondent appellant (No. COA94-1283), respondent appellee (No. COA95-678).

Hilliard & Jones, by Thomas Hilliard, III, for petitioner appellant (No. COA95-678).

William H. Peace, III, petitioner appellee (No. COA94-1283), pro se.

SMITH, Judge.

On 15 October 1985, William H. Peace, III ("Peace"), began his employment with respondent Employment Security Commission ("ESC") as its Equal Employment Opportunity ("EEO") officer. On 10 April 1991, an incident between Peace and a coworker ultimately led to Peace's dismissal for alleged unacceptable personal conduct. The State Personnel Commission ("SPC") adopted, *inter alia*, the following facts as recommended by the Administrative Law Judge ("ALJ"): During his 1985 orientation, Peace was informed that by paying \$2.00

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per month to the Personnel Office petty fund, he would be entitled to obtain an occasional cup of coffee from a pot located in the personnel file room. He paid the dues; however, his usual practice was to go to the agency's cafeteria for morning coffee. Prior to 10 April 1991, no one informed Peace that his payment into the petty fund did not entitle him to obtain coffee from the personnel file room. Over the years, on an irregular basis, he obtained coffee from the petty fund coffee pot. At a staff meeting which Peace did not attend, a coffee fund of \$3.40 per month was established for any interested participants. Peace was not made aware of a separate coffee fund, nor was he asked to join.

On 10 April 1991, Peace got a cup of coffee from the personnel file room. As Peace was leaving the office with the coffee, an exchange took place with Ms. Catherine High, a supervisor in the personnel office, in which she told him that he should pay her for the coffee. Peace refused. Ms. High called Peace "despicable" and told him she hoped he was fired. She told Peace that if he got another cup of coffee and did not pay her, she would get a cup of coffee and scald him with it. Ms. High informed her supervisor and Mr. Gene Baker, who became Peace's immediate supervisor as of 22 April 1991, of the incident.

On the afternoon of 10 April 1991, Peace contacted the magistrate's office regarding the incident with Ms. High. Peace was informed that, if he believed Ms. High was capable of carrying out her threat, he should take out a warrant against her. Peace spoke with Ms. High following his conversation with the magistrate's office, at which time he gave her an opportunity to apologize. Ms. High did not apologize. Thereafter, Peace had the magistrate's office issue summons against Ms. High charging her with communicating a threat. The charge was dismissed by the trial court as frivolous and Peace was ordered to pay court costs.

Peace was not contacted by his superiors regarding the incident until he received a predismissal conference memorandum on 5 June 1991, from Gene Baker, his immediate supervisor. Following a 6 June dismissal conference, Peace was discharged for unacceptable personal conduct. In a 7 June letter, Ann Q. Duncan, Chairperson of ESC, explained that Peace was being dismissed for unacceptable conduct, including taking the coffee without paying Catherine High and filing criminal charges against High, which were found to be frivolous. Such conduct, said Duncan, caused Peace's reputation as the EEO

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officer at ESC to be called into question and his respect among fellow employees diminished.

Peace filed two appeals of the ESC decision to discharge him. The bases of his appeals were that ESC lacked "just cause" to dismiss him pursuant to N.C. Gen. Stat. § 126-35 (1991), and that he had been discharged in retaliation for having filed discrimination charges against ESC in 1989, for violation of Title VII, Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3 (1988). Peace did not appeal upon a state claim of retaliatory discharge pursuant to N.C. Gen. Stat. § 126-36 (1987). Pursuant to N.C. Gen. Stat. § 7A-759 (1987), Peace's charge of retaliatory discharge was investigated by the Civil Rights Division of the Office of Administrative Hearings.

Through its investigation, the Office of Administrative Hearings ("OAH") found reasonable cause to believe that a violation of Title VII had occurred. OAH presented Peace with three options. He could: (1) receive a right to sue letter; (2) commence a contested case hearing in OAH; or (3) do nothing. Peace chose to commence a contested case hearing with regard to the retaliatory discharge claim. He also filed a petition for contested case hearing pursuant to N.C. Gen. Stat. § 126-35 on his lack of "just cause" claim. Pursuant to an order of the Chief Administrative Law Judge of OAH, both cases were consolidated for hearing. A hearing was conducted by ALJ Sammie Chess on 12-14 July 1993.

Pursuant to N.C. Gen. Stat. § 7A-759(e), an ALJ decision on the merits of a retaliatory discharge claim is a final agency decision binding on the parties absent a petition for judicial review. *See* N.C. Gen. Stat. § 150B-45 (1987). However, with regard to the N.C. Gen. Stat. § 126-35 lack of "just cause" claim, an ALJ issues a recommended decision to SPC, which then issues a final agency decision also subject to judicial review. N.C. Gen. Stat. § 126-37 (1991). ALJ Chess issued two separate decisions following the hearing. In his recommended decision to SPC, ALJ Chess found that ESC had the burden of proving it had "just cause" to discharge petitioner. ALJ Chess concluded that ESC had failed to meet that burden and recommended Peace be reinstated. In his final decision regarding the retaliatory discharge claim pursuant to Title VII, ALJ Chess also placed the burden of proof on ESC and concluded that Peace's discharge violated Section 704(a) of Title VII of the Civil Rights Act of 1964, in that his dismissal was retaliatory. Pursuant to that holding, ALJ Chess ordered petitioner reinstated.

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The ALJ's recommended decision reinstating Peace for lack of "just cause" was adopted, with slight modification, by SPC. ESC appealed SPC's final decision and the ALJ's final decision separately, pursuant to N.C. Gen. Stat. § 150B-50 (1987). In a 13 August 1994 order, Judge Narley L. Cashwell upheld the final agency decision of the ALJ with regard to the retaliatory discharge claim in which Peace was ordered reinstated. In a 13 March 1995 order, Judge Wiley F. Bowen reversed the final decision of SPC and dismissed Peace's petition challenging his dismissal on the "just cause" claim. ESC appeals Judge Cashwell's order affirming the retaliatory discharge claim. Peace appeals Judge Bowen's order reversing the SPC decision to reinstate him.

The proper standard of review for the superior court "depends upon the particular issues presented on appeal." *Act-Up Triangle v. Commission for Health Services of the State of North Carolina*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation omitted). If petitioner asks: "(1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the "whole record" test." *Id.* (quoting *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993)). Under the whole record test, a reviewing court is required to examine all competent evidence in order to determine whether the agency decision is supported by substantial evidence. *Id.* The definition of substantial evidence includes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 707, 483 S.E.2d at 393 (citation omitted). Furthermore, in making arbitrary or capricious determinations concerning the agency decision, the reviewing court "does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law." *Id.* at 707, 483 S.E.2d at 393 (citation omitted).

Appellate review of a superior court order concerning an agency decision requires an examination of the trial court's order for any errors of law. *Id.* at 706, 483 S.E.2d at 392. The two tasks involved include: "(1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* (citation omitted). The whole record test allows a reviewing court to determine whether an administrative decision has a rational basis in the evidence. *Id.* at 706-07, 483 S.E.2d at 392.

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As the reviewing court in the “just cause” case, we must take into account the specialized expertise of the staff of an administrative agency; in this case, the SPC. *See High Rock Lake Assoc. v. Environmental Management Comm.*, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981). While there is evidence in the record contrary to the Commission’s findings, neither this Court nor the superior court may substitute its judgment for that of the agency. After reviewing the record, we find substantial evidence to support the State Personnel Commission’s findings of fact.

At the outset, we note that the actions of both Peace and High were inappropriate and childlike. As a result of both parties’ improper behavior and subsequent refusals to resolve their differences amicably as adults, this matter has involved years of litigation and, as yet, remains unresolved. If there was ever a case that could have been resolved by the parties and participants in an employment controversy and was not, then this must be that case.

I. Title VII Retaliatory Discharge Claim**A. The Jurisdiction of OAH in Title VII Cases**

[1] As a preliminary matter, we address ESC’s argument that the trial court erred in failing to find OAH did not have jurisdiction to hear Peace’s Title VII retaliatory discharge claim, and also in failing to find OAH acted *ultra vires* by adjudicating such claim. ESC contends that only courts, and not administrative agencies, have jurisdiction to hear Title VII cases, and if OAH is authorized to hear Title VII claims, then it is functioning as a court in violation of N.C. Const. art. IV, § 1.

N.C. Const. art. IV, § 1 provides:

The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

N.C. Const. art. IV, § 3 permits the General Assembly to vest in administrative agencies established pursuant to N.C. Const. art. III, § 11 as part of the executive branch, such judicial powers as are reasonably necessary to accomplish the purposes for which the agencies were

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created, and also directs that appeals from such agencies shall be to the General Court of Justice.

Title VII authorizes the Equal Employment Opportunity Commission (“EEOC”) to enter into worksharing agreements with state and local agencies charged with the administration of state fair employment practices laws in order to fulfill its duty of preventing unlawful employment practices. 42 U.S.C. 2000e-8(b) (1988). When an alleged unlawful employment practice occurs in a state that has a law prohibiting the alleged practice and has established a state or local authority to grant or seek relief from such practice, Title VII provides that “‘no charge may be filed [with the EEOC] . . . by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated.’” *Davis v. North Carolina Dept. of Correction*, 48 F.3d 134, 137 (4th Cir. 1995) (quoting 42 U.S.C. 2000e-5(c) (1988)). Thus, where state law protects against the kind of discrimination alleged, Title VII requires that plaintiffs resort to state and local remedies before seeking relief under federal law. *Id.* N.C. Gen. Stat. § 7A-759 designates OAH as the State’s deferral agency for cases deferred by the EEOC as provided in 42 U.S.C. 2000e-5.

N.C. Gen. Stat. § 7A-759(e) provides that orders entered by an ALJ after a contested case hearing on the merits of a deferred charge is a final agency decision binding on the parties, and that an ALJ may order whatever remedial action is necessary to give full relief consistent with the requirements of federal statutes and regulations. However, an ALJ’s decision with respect to a deferred charge is not a judicial decision, but rather a final agency decision. This becomes apparent upon an evaluation of the rationale for the creation of OAH. According to the Administrative Procedure Act as originally adopted, 1973 N.C. Sess. Laws ch. 1331, § 150-30(a), the presiding officers for administrative hearings were designated by either an agency itself or by statute. In an effort to obtain nonbiased hearing officers with specialized knowledge of the issues presented, the General Assembly created OAH, an independent, quasi-judicial agency in order to “provide a source of independent hearing officers to preside in administrative cases and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process.” N.C. Gen. Stat. § 7A-750 (1985). Thus, because OAH was established as part of the executive branch pursuant to N.C. Const. art. III, § 11, it is not a court, and does not function as such when making final agency decisions on charges deferred from EEOC. *See also Utilities*

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Commission v. Finishing Plant, 264 N.C. 416, 422, 142 S.E.2d 8, 12 (1965) (“Administrative agencies . . . are distinguished from courts. They are not constituent parts of the General Court of Justice.”)

To support its argument that only courts, and not administrative agencies, have the authority to hear Title VII claims, ESC cites footnote four in *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 108 L. Ed. 2d 834 (1990). This footnote points out that Congress opted for judicial, rather than administrative enforcement of Title VII claims. *Id.* at 825, 108 L. Ed. 2d 840 n.4. However, this footnote precisely states Congress “preferred that the ultimate determination of discrimination rest with the Federal judiciary,” and not EEOC. *Id.* The Court does not attempt to say that state administrative agencies have no authority to hear Title VII claims. In fact, the Court, when discussing the 60-day delay found in 42 U.S.C. 2000e-5(c), says that such delay “is designed to give state administrative agencies an opportunity to invoke state rules of law.” *Yellow Freight System, Inc.*, 494 U.S. at 825, 108 L. Ed. 2d at 841. In light of this language and the plain language of Title VII, we conclude the trial court did not err in failing to find that OAH did not have jurisdiction to hear Peace’s Title VII claim, or that OAH acted *ultra vires* by adjudicating such claim.

A. Burden of Proof in Title VII Cases

[2] According to the North Carolina Supreme Court, the claimant carries the initial burden of proof in Title VII cases. *See North Carolina Department of Correction v. Gibson*, 308 N.C. 131, 137, 301 S.E.2d 78, 87 (1983). In addition, a prima facie showing of retaliatory discharge requires a plaintiff to show: (1) he engaged in some protected activity, such as filing an EEO complaint; (2) the employer took adverse employment action against plaintiff; and (3) that the protected conduct was a substantial or motivating factor in the adverse action (a causal connection existed between the protected activity and the adverse action). *See Kennedy v. Guilford Technical Community College*, 115 N.C. App. 581, 584, 448 S.E.2d 280, 282 (1994) (adopting the federal rules on prima facie showing in a state retaliatory discharge claim) (plaintiff claimed she was retaliated against for filing race and sex discrimination charges with the EEOC). Petitioner must prove “but for” causation instead of “motivating factor” in his prima facie case of retaliatory acts in violation of Title VII. *Id.*

After plaintiff presents a prima facie case of retaliation, “‘the burden shifts to the defendant to show it would have taken the same action even in the absence of protected conduct’”. *Id.* (quoting

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McCauley v. Greensboro City Bd. of Educ., 714 F.Supp. 146, 153 (M.D.N.C. 1987)). Defendant must articulate a legitimate nondiscriminatory reason for its action. *Id.* at 584-85, 448 S.E.2d at 282. A legitimate reason overcomes the presumption of discrimination from plaintiff's *prima facie* showing if it has "a rational connection with the business goal of securing a competent and trustworthy work force." *Id.* at 585, 448 S.E.2d at 282 (quoting *Harris v. Marsh*, 679 F.Supp. 1204, 1285 (E.D.N.C. 1987), *aff'd in part, rev'd in part on other grounds by Blue v. U.S. Dept. of Army*, 914 F.2d 525 (4th Cir. 1990)).

If defendant shows a legitimate reason that overcomes the presumption, plaintiff then has to show that the reason was only a pretext for the retaliatory action. *Id.* Therefore, "a plaintiff retains the ultimate burden of proving that the [adverse employment action] would not have occurred had there been no protected activity engaged in by the plaintiff." *Id.* (quoting *Melchi v. Burns Int'l Sec. Servs. Inc.*, 597 F.Supp. 575, 583 (E.D. Mich. 1984)).

[3] In the instant case, plaintiff Peace claims the true reason he was discharged is because he filed discrimination claims against the EEOC in 1989, a protected activity, instead of the proffered reasons surrounding the coffee incident in 1991. However, the ALJ erred by placing the initial burden of proof on the defendant employer to show an absence of retaliatory purpose prior to Peace's *prima facie* showing of retaliatory discharge. Since the trial court affirmed the ALJ who had improperly placed the burden of proof on ESC, this retaliatory discharge claim must be reversed and remanded to the lower court for further remand to OAH for proceedings not inconsistent with this opinion.

II. "Just Cause" Claim

With respect to his "just cause" claim, Peace contends the trial court erred in determining that SPC's decision and order improperly placed the burden of proof on ESC. He argues that because ESC is in a better position to "ferret out the reasoning behind his termination" than he is, ESC should have the burden of proof.

[4] N.C. Gen. Stat. § 126-35 states, in pertinent part, "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." It is undisputed in the instant case that Peace had a property interest of continued employment created by N.C. Gen. Stat. § 126-35 and pro-

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tected by the Due Process Clause of the United States Constitution. See *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 348, 342 S.E.2d 914, 921, cert. denied, 318 N.C. 507, 349 S.E.2d 862 (1986). In *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33 (1976), the United States Supreme Court set forth three factors to be considered in determining what process is due when an individual is faced with the deprivation of a property interest:

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

We acknowledge that the private interest affected, the first factor to be considered under the *Mathews* test, is of the utmost importance. Courts "have frequently recognized the severity of depriving a person of the means of livelihood." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 543, 84 L. Ed. 2d 494, 504 (1985). We also acknowledge the State's substantial interest in maintaining employee discipline and efficiency.

[T]he Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs.

Arnett v. Kennedy, 416 U.S. 134, 168, 40 L. Ed. 2d 15, 41 (1974). The central issue in the present case concerns the second *Mathews* factor: whether placing the burden of proof on an employee to show he was terminated without "just cause" creates a substantial risk of erroneous termination.

We first note the absence of a statute or other authority allocating the burden of proof in "just cause" claims. Though we attempt to place such burden in a manner that will obviate the risk of erroneous termination, we believe the burden of proof would have been more properly allocated by our General Assembly, or even possibly by SPC pursuant to the rule-making authority found in N.C. Gen. Stat. §§ 126-4 (6), (7a), (9), and (11) (1995) and 126-26 (1995).

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According to 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 30 (4th ed. 1993), the burden of proof encompasses both the burden of producing evidence and the burden of persuasion. The burden of producing evidence is the burden of a party to satisfy the trier of fact that sufficient evidence has been presented to justify a finding in that party's favor. *Id.* The burden of persuasion is the burden of convincing the trier of fact. *Id.* This burden generally falls on the party who will lose if the trier of fact is in doubt after all the evidence is in. *Id.*

[5] When statutes fail to dictate with whom the burden of persuasion lies, the burden is judicially allocated based on "considerations of policy, fairness and common sense . . ." *Id.* at § 37. For cases in which the burden of proof remains unallocated, it has been suggested that the burden be placed "upon the party who has peculiar knowledge of the facts and who, therefore, is better able to produce proof." *Id.* In the instant case, the party having particular knowledge as to the cause of Peace's dismissal is ESC. An employee allegedly dismissed for "just cause" would be faced with an almost insurmountable task in attempting to prove he or she was dismissed for something short of "just cause," in that the employee would be forced to prove a negative. We believe the better view is to allocate the initial burden of proof to the employer to prove that an employee was dismissed for "just cause" and then have the employee come forward with evidence showing that his or her dismissal was made without "just cause." Here, SPC expressly adopted the ALJ's Conclusion of Law Number 2, which states "[w]here just cause is an issue, the Respondent [ESC] bears the ultimate burden of persuasion." Taking into account "the specialized expertise of the staff of an administrative agency," we give great deference to SPC's decision to place the burden of proof on ESC. *High Rock Lake Assoc.*, 51 N.C. App. at 279, 276 S.E.2d at 475. However, in light of our Supreme Court's recent decision in *Soles v. City of Raleigh Civil Service Comm.*, 345 N.C. 443, 480 S.E.2d 685, we are compelled to find that placing the burden of proof in "just cause" claims on the employee does not pose a substantial threat of erroneous termination and therefore does not violate due process.

In *Soles*, petitioner was hired by the City of Raleigh on 5 April 1984 as an Engineering Aide I and was promoted to Engineering Aide II on 13 August 1986. *Id.* at 444, 480 S.E.2d at 686. Petitioner was terminated from his employment on 2 December 1990 for "personal conduct detrimental to City service." *Id.* at 445, 480 S.E.2d at 686.

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Following an unsuccessful appeal to the City Manager, petitioner petitioned for an administrative hearing before the Raleigh Civil Service Commission alleging he had been “‘dismissed without justifiable cause.’” *Id.* The Commission concluded petitioner had failed to establish by the greater weight of the evidence that he had been terminated without justifiable cause. *Id.* Petitioner then sought judicial review alleging that the Commission’s finding that he had “‘failed to establish by the greater weight of the evidence that he was terminated without justifiable cause’” violated his constitutional rights. *Id.* at 445-46, 480 S.E.2d at 686-87. The trial court reversed the Commission’s decision on the grounds that allocating the burden of proof to petitioner violated his right to due process, and this Court unanimously affirmed. *Id.* at 446, 480 S.E.2d at 687.

On appeal, our Supreme Court held that petitioner possessed no constitutionally protected property interest in his continued employment with the City, and that placing the burden of proof on him to prove he was dismissed without just cause did not violate due process. *Id.* at 447-48, 480 S.E.2d at 688. The Court stated “while the placement of the burden of proof is rarely without consequence and frequently dispositive of the outcome of the litigation, ‘[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.’” *Id.* at 449, 480 S.E.2d at 689 (quoting *Lavine v. Milne*, 424 U.S. 577, 585, 47 L. Ed. 2d 249, 256 (1976)). The Court also observed that a constitutional right to a certain allocation of the burden of proof exists only when a fundamental right is at issue. *Soles*, 345 N.C. at 449, 480 S.E.2d at 689. The Court then stated, “[w]here, as here, no fundamental right is at issue, the allocation of the burden of proof in civil cases is irrelevant to constitutional questions of procedural due process.” *Id.* In conclusion, the Court cited *Arnett v. Kennedy*, 416 U.S. 134, 40 L. Ed. 2d 15, which held that due process did not require a pre-termination evidentiary hearing for a federal employee who could be terminated only for cause, for the proposition that “if it is permissible to dismiss an employee without any evidentiary hearing whatsoever, it is similarly permissible to discharge an employee after an evidentiary hearing in which the burden of proof is placed on the employee.” *Soles*, 345 N.C. at 450, 480 S.E.2d at 689.

[6] While *Soles* involved a city employee with no constitutionally protected interest in continued employment, we are nevertheless guided by the *Soles* decision in determining where the burden of proof should fall in a “just cause” claim pursuant to N.C. Gen. Stat. § 126-35

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involving a state employee with a constitutionally protected property interest in continued employment. While this issue was not directly before the Court in *Soles*, the Court made the statement that “[a]ssuming a situation existed in which an employee was entitled to procedural due process protection, we agree with the City and hold that the allocation of the burden of proof to a disciplined employee does not violate the employee’s guarantees of procedural due process.” *Soles*, 345 N.C. at 448, 480 S.E.2d at 688. Thus, based on *Soles*, we hold that the burden of proof in “just cause” claims pursuant to N.C. Gen. Stat. § 126-35 may be allocated to an employee without violating due process. The trial court therefore did not err by determining that SPC’s decision and order improperly placed the burden of proof on ESC.

III. Peace’s Motion for Rule 11 Sanctions

Pro se plaintiff Peace asserts in his brief that Rule 11 sanctions should be imposed against the ESC attorneys. Peace claims that ESC frivolously submitted yet another appeal after losing on this retaliatory discharge claim below, and additionally for appealing two other cases between these two parties. Furthermore, Peace claims the attorneys filed an appeal for the mere purpose of delay and to increase Peace’s legal fees. In light of our rulings, this claim for sanctions is dismissed.

IV. Conclusion

In both appeals, the ALJ improperly placed the burden of proof on the employer. In *Gibson*, the North Carolina Supreme Court held that the burden of proof is on the employee in Title VII cases, including retaliatory discharge claims. *North Carolina Dept. of Correction v. Gibson*, 308 N.C. at 137, 301 S.E.2d at 87. Thus, the retaliatory discharge claim is reversed and remanded to the trial court for further remand to the ALJ for proceedings not inconsistent with this opinion. Furthermore, in light of the Supreme Court’s decision in *Soles v. City of Raleigh Civil Service Commission*, 345 N.C. 443, 480 S.E.2d 685, Peace’s “just cause” claim is remanded to the superior court for further remand for the application of the proper burden of proof. Finally, Peace’s motion for sanctions is denied.

Reversed and remanded in No. 93 CVS 10599.

Remanded in No. 94 CVS 11517.

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Judge LEWIS concurs.

Judge GREENE dissents in part.

Judge GREENE dissenting in part.

I disagree with the majority's affirmance of the trial court's determination that the State Personnel Commission improperly placed the burden of proof on the Employment Security Commission of North Carolina, and would reverse the trial court on this issue.

First, I agree with the majority's well-reasoned explanation of why the burden of proof in a termination without just cause case is more fairly placed upon the employer. I add only that this Court has repeatedly acquiesced in the placement of the burden of proof on the employer in just cause cases. *See Davis v. N.C. Dept. of Human Resources*, 110 N.C. App. 730, 432 S.E.2d 132 (1993) (not addressing placement of the burden of proof on the employer); *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 504, 397 S.E.2d 350, 355 (1990) (affirming the trial court's conclusion that the employer "had not met *its* burden of showing just cause to uphold the terminations") (emphasis added), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991); *Employment Security Comm. v. Wells*, 50 N.C. App. 389, 391, 274 S.E.2d 256, 258 (1981) ("not reach[ing] the question of whether [the employer] failed to carry the necessary burden of proof to show just cause for petitioner's dismissal from its employ" because case remanded on other grounds).

I disagree with the majority's conclusion that *Soles v. City of Raleigh Civil Service Comm.*, 345 N.C. 443, 480 S.E.2d 685 (1997), mandates placement of the burden of proof on the employee in just cause cases. *Soles* merely stands for the proposition that, where a pre-existing rule mandates placement of the burden of proof on the employee, such placement does not violate the employee's due process rights. *Soles*, 345 N.C. at 448, 480 S.E.2d at 688. There is no pre-existing rule mandating placement of that burden on the employee in this case. *Soles* does not, either explicitly or implicitly, require courts to place the burden of proof on the employee in just cause cases.

Absent specific guidance from our Supreme Court or our General Assembly, I do not believe we should depart from our customary practice of placing the burden of proof on the employer in just cause cases.

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STATE OF NORTH CAROLINA v. CLAUDE EDWARD DAMMONS

No. COA97-31

(Filed 2 December 1997)

1. Criminal Law § 143 (NCI4th Rev.)— 1973 guilty plea—failure to inform defendant of certain constitutional rights—voluntary plea—no *Boykin v. Alabama* violation

Defendant's 1973 guilty plea was not obtained in violation of *Boykin v. Alabama*, 395 U.S. 238, because the court that accepted the plea failed to inform defendant of his constitutional right to trial by jury, his right to confront his accusers, and his privilege against self-incrimination, where the evidence supported the trial court's finding that the 1973 plea was freely, voluntarily and understandingly entered by defendant.

2. Evidence and Witnesses § 344 (NCI4th)— aggravated assault—details of other assaults—cross-examination proper

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the State's cross-examination of defendant about the names of other women he had been convicted of shooting, his relationship with those other women, and the type of weapons he had used was proper under Rule 404(b) to show that defendant had a history of shooting women with whom he had previously had relationships. N.C.G.S. § 8C-1, Rule 404(b).

3. Searches and Seizures § 45 (NCI4th)— unlawful detention—seizure after subsequent lawful arrest

Even if defendant's detention in a patrol car was an unlawful arrest, officers lawfully searched defendant without a warrant and properly seized his overcoat and gunshot residue from his hand after his lawful arrest at the sheriff's office based upon probable cause.

4. Criminal Law § 925 (NCI4th Rev.)— polling of jury—failure to state full verdict—unanimous verdict

The jury returned a unanimous verdict, even though the clerk of court did not state the full verdict of "guilty of assault with a deadly weapon inflicting serious injury" when polling the individual jurors but just stated "guilty of assault with a deadly weapon," where only one crime was charged and submitted to the jury, and

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the clerk correctly stated the charge when originally asking the foreperson about the verdict.

5. Criminal Law § 1313 (NCI4th Rev.)— habitual felon charge—underlying conviction—collateral attack

Defendant could not collaterally attack the validity of an underlying conviction that supported an habitual felon charge; rather, the original conviction could be properly attacked only by appropriate post-trial relief motions.

Appeal by defendant from an order and judgment dated 4 March 1996 and from judgment dated 6 March 1996 by Judge Wiley F. Bowen in Lee County Superior Court. Heard in the Court of Appeals 22 October 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Wm. Dennis Worley, for the State.

Staton, Perkinson, Doster, Post, Silverman, Adcock & Boone, by Norman C. Post, Jr., and Michelle A. Cummins, for defendant appellant.

GREENE, Judge.

Claude Dammons (defendant) appeals from: (1) the trial court's denial of his motion for appropriate relief from a 1973 conviction of voluntary manslaughter (72 CRS 7307); (2) the trial court's denial of his motion for appropriate relief from a 1994 conviction of assault with a deadly weapon with intent to kill inflicting serious injury as a habitual felon (94 CRS 1031 and 94 CRS 2227); (3) the trial court's resentencing in 94 CRS 1031 and 94 CRS 2227; (4) a 1996 conviction of assault with a deadly weapon inflicting serious injury as a habitual felon (93 CRS 1969 and 93 CRS 2813).

The relevant facts for each motion and the conviction are as follows:

Motion for Appropriate Relief in 72 CRS 7307

On 22 March 1973, the defendant was convicted of voluntary manslaughter in 72 CRS 7307 pursuant to a guilty plea. The transcript from this conviction reveals that the trial court asked the defendant the following questions concerning his guilty plea:

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The court: Do you understand you are charged with the offense of murder and you are tendering a plea of guilty to the offense of voluntary manslaughter?

The defendant: Yes, sir.

The court: Have these charges been explained to you by your attorney and are you ready for this hearing upon your plea?

The defendant: Yes, sir.

The court: Do you understand that you have a right to plead not guilty of any offense and have your cause heard by a jury?

The defendant: Yes, sir.

....

The court: Now, if you did serve witnesses, have you had an opportunity to obtain those witnesses?

The defendant: No, sir.

The court: Do you want witnesses for this hearing?

The defendant: I had like—

The court: Has anyone prohibited you from obtaining witnesses you might want?

The defendant: No, sir.

The court: I take it the answer to the question is yes, you had a chance to get witnesses if you want one [sic]?

The defendant: Yes, sir.

The court: Have you had an opportunity to confer with your attorney and have you conferred with him and are you satisfied with his services?

The defendant: Yes, sir.

The court: Now, has the solicitor, your attorney, any policeman, et cetera, or any other person made any promise to you or any threat to influence you to plead guilty?

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The defendant: No, sir.

The court: Do you contend or say that anyone has violated any of your constitutional rights with respect to this case?

The defendant: No, sir.

The court: Do you now freely understand and voluntarily authorize and instruct your attorney to enter a plea of guilty in your behalf?

The defendant: Yes, sir.

In 1996, the defendant made a motion for appropriate relief from 72 CRS 7307 and asserted that conviction was obtained in violation of his federal constitutional rights as defined by *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969), because the record fails to show that the defendant's guilty plea had been made freely and voluntarily and with full understanding of the constitutional rights he had waived. The trial court denied the motion for appropriate relief, stating that the "written transcript of plea clearly shows the plea to be 'freely, voluntarily, and understandingly' made, and that the defendant had been 'fully advised of his rights.' "

**Motion for Appropriate Relief in 94 CRS 1031
and 94 CRS 2227**

In May of 1994 the defendant was convicted of assault with a deadly weapon inflicting serious injury and of being a habitual felon in 94 CRS 1031 and 2227. The defendant appealed and this Court granted a re-sentencing because of errors in the sentencing phase of the habitual felon trial. In March of 1996, the defendant asked for a motion for appropriate relief in 94 CRS 1031 and 2227 on the basis that he was given ineffective assistance of counsel in the initial proceedings of 94 CRS 1031 and 2227 because his counsel allowed him to plead guilty to habitual felon status in 94 CRS 2227 and failed to challenge the 72 CRS 7307 conviction as being in violation of *Boykin*. The trial court denied this motion for appropriate relief and concluded that the ineffective counsel allegations were not "supported by credible factual evidence," and even if the counsel's actions were "marginally deficient . . . they produced no prejudice to the petitioner."

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Conviction in 93 CRS 1969 and 93 CRS 2813

In March 1994, the defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury in 93 CRS 1969 and was convicted of being a habitual felon in 93 CRS 2813. The defendant had pled not guilty to the charges. After the conviction, the defendant appealed to this Court and was granted a new trial. This new trial in 93 CRS 1969 and 2813 was held in March of 1996 and the defendant was again convicted of assault with a deadly weapon with intent to kill inflicting serious injury and of being a habitual felon. The defendant appeals from this second trial. These convictions are based on the following facts:

On 27 February 1993, the defendant, Mary McLaughlin (McLaughlin), and Eloise Headen (Headen), were driving a gray four-door automobile. They stopped at a country church where the defendant and Headen proceeded to walk to the cemetery. Later that morning, Lee County Sheriff's Department Detective, Billy Baker (Detective Baker), responded to a call in reference to a shooting in front of the Short Stop convenience store in Lee County. When Detective Baker arrived at the Short Stop, a large gray Buick was parked outside; Headen was inside the automobile with gunshot wounds. The clerk from the Short Stop had stated to Officer Kenneth Womack and Deputy Loren Lewis (Officers) that a black male had driven a gray Buick into the parking lot and then came inside and told him (the clerk) to call the rescue squad. The black male then went to the adjoining barbershop. When the Officers approached the barbershop, they observed the defendant, who matched the clerk's description, leaving the barbershop. The Officers asked the defendant a few questions but he did not answer and continued to walk away. He was then handcuffed and placed in the patrol car. When Detective Baker arrived, the defendant got out of the patrol car in handcuffs and proceeded to walk away. Detective Baker stopped the defendant and put him back in the patrol car. The defendant was then transported to the Lee County Sheriff's Department where he was placed under arrest and a long beige overcoat was taken from him and his hands were wiped for gunshot residue. No blood was observed on the defendant's clothes nor were any weapons found in his possession.

At trial, Headen testified that the defendant had shot her three times at the graveyard. Evidence was introduced which showed that Headen was intoxicated that day and that she had used cocaine on the morning of the shooting. In his own defense, the defendant denied

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shooting Headen at the cemetery and testified that an individual named Pulley came to the cemetery and argued with Headen. The defendant testified that he left Headen and Pulley at the cemetery. Because the defendant lived behind the Short Stop, when he observed a crowd gathered there, he walked to the store. He was then handcuffed and put in the patrol car. On cross-examination the State was allowed, over the objection of the defendant, to ask the defendant about his prior criminal convictions and particular details of the past convictions.

The defendant filed a motion to suppress evidence seized from his person (the beige overcoat and gunshot residue) on the grounds that his detention in the patrol car amounted to an unlawful arrest that was not based on probable cause and therefore the evidence seized from him was illegally obtained. The trial court concluded that there existed probable cause to arrest the defendant at the Lee County Sheriff's Department and denied the defendant's motion.

The jury returned a verdict of guilty in 93 CRS 1969. The transcript reveals that the following transpired:

Clerk: Members of the jury, will you please stand. Members of the jury, you have returned as your unanimous verdict to the defendant, Claude Edward Dammons, guilty of assault with a deadly weapon inflicting serious injury. Is this your verdict?

Foreperson: It is.

Clerk: Is this still your verdict?

Foreperson: Yes.

The verdict sheet in 93 CRS 1969 indicated that the jury found the defendant guilty of assault with a deadly weapon inflicting serious injury. Thereafter, however, the defendant's attorney asked that the jury be polled. In polling the jury, the clerk of court did not fully state the whole charge against the defendant and instead, stated the following:

If you'll be seated, when I call your name if you'll stand and answer the questions that I ask you. And I'll start with the foreperson, Mr. Parkerson. Mr. Parkerson, you have returned as your verdict, guilty of assault with a deadly weapon to Claude Dammons, is this your verdict?

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The foreperson assented to the question and each juror answered that the verdict given by the foreperson was still his or her verdict.

The trial court denied the defendant's motion to suppress his 72 CRS 7307 conviction in his sentencing as a habitual felon in 94 CRS 2227 and 93 CRS 2813.

The issues are whether: (I) the conviction in 72 CRS 7307 was obtained in violation of *Boykin v. Alabama*; (II) the defendant's conviction as a habitual felon in 94 CRS 2227 resulted from ineffective assistance of counsel; (III) the State was allowed to exceed the permissible scope of cross-examination in 93 CRS 1969; (IV) Detective Baker had authority to seize the defendant's beige overcoat and obtain gunshot residue from the defendant's hand; (V) the clerk of court's misstatement of the verdict when polling the jury constituted reversible error; and (VI) the defendant's conviction in 72 CRS 7307 was appropriately used for sentencing purposes in 94 CRS 2227 and 93 CRS 2813.

I

This Court may review a trial court's ruling on a motion for appropriate relief if "the time for appeal has expired and no appeal is pending, by writ of certiorari." N.C.G.S. § 15A-1422(c)(3) (1988); *State v. Morgan*, 118 N.C. App. 461, 463, 455 S.E.2d 490, 491 (1995). In this case, the defendant pled guilty in 72 CRS 7307 and no appeal was made from that conviction. In our discretion and in accordance with Rule 2 of the North Carolina Rules of Appellate Procedure, we nonetheless accept certiorari and address the merits of defendant's argument.

[1] The defendant contends that his conviction (based on a plea of guilty) in 72 CRS 7307 was obtained in violation of *Boykin v. Alabama* because the record does not show that the trial court which accepted his guilty plea specifically informed the defendant of his constitutional rights to trial by jury, the right to confront his accusers, and the privilege against compulsory self-incrimination. We disagree.

A trial court accepting a plea of guilty from a defendant is required to "make sure [that the defendant] has a full understanding of what the plea connotes and of its consequence." *Boykin*, 395 U.S. at 244, 23 L. Ed. 2d at 280. Furthermore the face of the record must reveal that the confession was voluntary and intelligently and under-

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standingly entered. *Boykin*, 395 U.S. at 242 and 244, 23 L. Ed. 2d at 279-80; *State v. Ellis*, 13 N.C. App. 163, 165, 185 S.E.2d 40, 42 (1971) (guilty plea will not be disturbed if evidence supports finding of trial court that the defendant freely, understandingly, and voluntarily pleaded guilty). There is no constitutional requirement that the trial court specifically inform the defendant of his right to trial by jury, his right to confront his accusers, and his privilege against compulsory self-incrimination.¹ See LaFave and Israel, *Criminal Procedure* § 20.4(e) at 651 (1984); see also *Brady v. United States*, 397 U.S. 742, 743-44, 25 L. Ed. 2d 747, 753-54 (1970) (guilty plea sustained on finding that it was “voluntarily and knowingly made,” even though defendant had not specifically been informed of the privilege against self-incrimination, the right to trial by jury, and the right to confront one’s accusers); *State v. Harris*, 14 N.C. App. 268, 270, 188 S.E.2d 1, 2 (1972) (confession set aside, based on *Boykin*, where record was devoid of anything that would indicate that the trial court made any inquiry into whether the guilty plea was voluntarily made and knowingly entered).

In this case, the trial court determined that the 1973 plea was “freely, voluntarily, and understandingly” entered by the defendant. Our review of the dialogue between the trial judge and the defendant reveals evidence to support this determination. See *State v. Blake*, 14 N.C. App. 367, 371, 188 S.E.2d 607, 610 (1972). Accordingly, this motion for appropriate relief was properly denied by the trial court.

II

N.C. Gen. Stat. § 15A-1422(c)(2) gives a defendant an appeal of right from a denial of a motion for appropriate relief when “an appeal is pending when the ruling is entered” N.C.G.S. § 15A-1422(c)(2) (1988). In this case, the trial court denied the motion for appropriate relief in 94 CRS 1031 and 2227 on 13 March 1996, but the defendant had already given notice of appeal from the re-sentencing of those cases. The State argues that the defendant does not have an appeal of right from the denial of the motion for appropriate relief because the defendant appealed from the re-sentencing and no appeal from

1. Pursuant to a statute now in place (not effective at the time the defendant pled guilty in 1973) a superior court judge may not accept a plea of guilty or no contest from a defendant (“[e]xcept in the case of corporations or in misdemeanor cases in which there is a waiver of appearance”) “without first addressing him personally . . . and [i]nforming him that [among other things] he has a right to remain silent and that any statement he makes may be used against him”; he has a right to a trial by jury and waives that right by pleading guilty; and he has a “right to be confronted by the witnesses against him.” N.C.G.S. § 15A-1022(a) (Supp. 1996).

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the conviction was pending. We assume without deciding, however, that an appeal pending from the re-sentencing qualifies under section 15A-1422(c)(2). Therefore, this Court must review the denial of the motion for appropriate relief.

The defendant contends that he pled guilty and was sentenced as a habitual felon in 94 CRS 2227 because of ineffective assistance of counsel. The basis of this argument is that had his counsel performed adequate research, he would have found that the defendant's conviction in 72 CRS 7307 was obtained in violation of *Boykin* and that armed with that knowledge the defendant would not have pled guilty in 94 CRS 2227. Because we have held that the 72 CRS 7307 conviction was not obtained in violation of *Boykin*, we reject the defendant's argument.

III

[2] The defendant argues that the trial court permitted the State to exceed the permissible scope of cross-examination when it allowed the State to examine him about the details of his prior convictions. We disagree.

We acknowledge that Rule 609(a) of the North Carolina Rules of Evidence limits the scope of inquiry into prior convictions "to the name of the crime, the time and place of conviction, and the punishment imposed." *State v. Lynch*, 334 N.C. 402, 409, 432 S.E.2d 349, 352 (1993). Rule 404(b), however, allows relevant evidence of other crimes, wrongs or acts by the defendant unless the *only* probative value of the evidence is to show that the defendant had the "propensity or disposition to commit an offense of the nature of the crime charged." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 852 (1995) (citation omitted), *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995). Two further constraints, similarity and temporal proximity, also limit the inclusion of evidence under Rule 404(b). *State v. Artis*, 325 N.C. 278, 299-300, 384 S.E.2d 470, 481-82 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). When the features of the other crimes or wrongs are similar to the crime at issue and there is not a significant length of time between those past acts and the present one, the evidence has probative value. *Id.*

In this case, the trial court allowed the State to ask the defendant questions about the names of other women he had been convicted of shooting, his relationship with those other women, and type of

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weapons he had used. The State contends that this evidence tended to show that the defendant had a history of shooting women with whom he had previously had relationships and thus admissible under Rule 404(b). We agree and reject, because of the similarities between the prior crimes and the present one, the contention that its only probative value was to show the defendant's propensity to commit crimes of the nature of the offense charged in this case. *See Lynch*, 334 N.C. at 412, 432 S.E.2d at 354 (evidence of prior crimes not admissible because no logical relationship to present charges).

IV

[3] The defendant argues that he was arrested when he was detained in the patrol car and that there did not exist probable cause to support the arrest without a warrant. It follows, the defendant argues, that the evidence taken from him was illegally obtained and should have been suppressed.

Assuming the defendant's detention in the patrol car was an unlawful arrest, the trial court's denial of the motion to suppress is nonetheless proper because the overcoat and the gun residue were not seized until the defendant was taken to the Lee County Sheriff's Department and arrested. At that point, the trial court concluded that there existed probable cause to arrest the defendant and the defendant does not argue otherwise. *See N.C.G.S. § 15A-401(b)(2)(a)* (Supp. 1996) (officer may arrest without warrant if he has probable cause to believe a felony has been committed). Once the arrest occurred, the officers were within their authority to search the defendant without a warrant. *State v. Mack*, 57 N.C. App. 163, 167, 290 S.E.2d 741, 743 (1982).

V

[4] Our Supreme Court has noted that defendants may poll the jury and ascertain whether the jurors assented in both the jury room and in open court to the verdict. *State v. Asbury*, 291 N.C. 164, 169-70, 229 S.E.2d 175, 177-78 (1976). *See also State v. Harrison*, 20 N.C. App. 734, 734 and 736, 203 S.E.2d 89, 90 and 91 (1974) (finding that when a foreperson of the jury suffered a slip of the tongue in delivering the verdict and stated, "guilty of voluntary—of murder in the second degree" when the defendant had been convicted of second degree murder, there was no prejudicial error because all the jurors assented to the verdict when asked and the defendant had the right to have the jury polled).

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The defendant contends that because the clerk of court did not state the full verdict of “guilty of assault with a deadly weapon inflicting serious injury” when polling the jurors and instead just stated “guilty of assault with a deadly weapon,” the jury did not return a unanimous verdict. We disagree.

In this case, there was no room for confusion as to the defendant’s conviction because only one crime was charged and submitted to the jury. In addition, the record clearly indicates that the clerk of court correctly stated the charge when originally asking the foreperson about the verdict.

Clerk: Members of the jury will you please stand. Members of the jury, you have returned as your unanimous verdict to the defendant, Claude Edward Dammons, guilty of assault with a deadly weapon inflicting serious injury. Is this your verdict?

Foreperson: It is.

Clerk: Is this still your verdict?

Foreperson: Yes.

The clerk did misstate the charge when individually polling the jurors and only stated, “guilty of assault with a deadly weapon”; however, this was not reversible error and we find the defendant’s argument unpersuasive.

VI

[5] This Court has previously held that a defendant may not collaterally attack the validity of underlying convictions that support a habitual felon charge. *State v. Creason*, 123 N.C. App. 495, 500, 473 S.E.2d 771, 773 (1996), *affirmed per curiam*, 346 N.C. 165, 484 S.E.2d 525 (1997). In appealing the use of a prior conviction in a habitual felon charge, the defendant is limited to inquiring whether the State gave the defendant proper notice that he would be prosecuted for a substantive felony as a repeat offender. *Id.* The original conviction is properly attacked by making the appropriate post trial relief motions as prescribed by Chapter 15A, Article 89 of the North Carolina General Statutes. *Id.*

In this case, the defendant improperly attacks the validity of his 72 CRS 7307 conviction in the later habitual felon trials. Any constitutional errors in the 72 CRS 7307 conviction must be addressed

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directly. The defendant has made a motion for appropriate relief in 72 CRS 7307 and we have already addressed that issue. Accordingly, the collateral attack is impermissible and we overrule it.

No error.

Judges JOHN and TIMMONS-GOODSON concur.

DAVID A. TEDDER AND WIFE, AMY L. TEDDER, AND A & D ENVIRONMENTAL AND INDUSTRIAL SERVICES, INC., PLAINTIFFS-APPELLANTS v. EDGAR V. ALFORD AND WIFE, NANCY W. ALFORD AND ROSS P. ALFORD AND WIFE, APRIL H. ALFORD, AND ALFORD TRUCK LEASING, INC., (SUCCESSOR BY MERGER TO ALFORD FURNITURE CARRIERS, INC.), AND GLENOLA FENCE COMPANY, DEFENDANTS-APPELLEES

No. COA97-2

(Filed 2 December 1997)

1. Easements § 9 (NCI4th)— creation of easement—standard language in warranty deed—insufficient

Summary judgment was properly granted for defendants in an action for an injunction arising from a proposed fence on the issue of whether an express easement existed in plaintiffs' favor and whether plaintiffs were entitled to specific performance where plaintiffs purchased a portion of defendants' commercial property; plaintiffs added improvements to the rear of their building as their business grew and heavy equipment used by them and their customers began to drive onto defendants' adjoining property to get to the rear of the building; defendants had things stolen as a result of plaintiffs' employees leaving open the gate of a fence around both properties; and defendants eventually hired a company to erect a fence along the line between the two properties. Although plaintiffs contend that the language of the deed regarding "all privileges and appurtenances thereto belonging" includes easements, that language is no more than the standard language found in most warranty deeds and does not by itself serve as a recording of an agreement to convey an easement or right-of-way to the plaintiffs. Likewise, language at the end of the deed which provides that the conveyance is subject to all rights of way, easements and restrictions of record is also insufficient. Plaintiffs did not meet their burden of proof under the statute of

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frauds because the deed contains no record of an agreement between the parties to convey an easement to plaintiffs.

2. Easements § 23 (NCI4th)— easement by implication—necessity of use

The trial court did not err in an action for an injunction arising from a proposed fence by granting a directed verdict for defendants on the issue of whether an easement by implication existed where plaintiffs had purchased a portion of defendants' commercial property, plaintiffs' expanding business resulted in their equipment being driven onto defendants' property and other problems, and defendants proposed a fence between the two properties. A plaintiff seeking an easement by implication must prove, among other elements, that the owner used one part of the tract for the benefit of the other part before the transfer and that this use was apparent, continuous and permanent. The transcript in this case reveals no evidence upon which a reasonable jury could have concluded that there was any "prior use."

3. Easements § 27 (NCI4th)— easement by necessity—sufficiency of evidence

The trial court did not err in an action arising from a proposed fence by granting a directed verdict on the issue of easement by necessity where plaintiffs had purchased a portion of defendants' commercial property, plaintiffs' expanding business resulted in their equipment being driven onto defendants' property and other problems, and defendant hired a company to erect a fence between the two properties. The record reveals that plaintiffs' trucks had direct access to their property from two public roads and it could not reasonably be concluded that plaintiffs had no access to their land except over the land of defendants, thereby necessitating a right-of-way across defendants' property. Furthermore, the record fails to show that the defendants intended for plaintiffs to have a continued right of access across their property because the "need" to turn plaintiffs' trucks around on defendants' property did not arise until after the tract had been deeded to plaintiffs by defendants and after plaintiffs had constructed an addition to their building.

4. Nuisance § 4 (NCI4th)— spite fence—insufficient evidence

The trial court did not err by directing a verdict against plaintiffs in an action for an injunction arising from a proposed fence on the issue of whether the fence was a "spite fence" where there

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was no evidence that the plan to put up a fence was solely motivated by a malicious desire to harm or harass plaintiffs. The evidence at best showed that defendants were displeased with the fact that plaintiffs were unwilling to buy their property at their desired price and that plaintiffs had stopped using their truck repair service, but there was no evidence to support the conclusion that this displeasure was what dictated the decision to erect a fence and there was evidence to support the conclusion that the decision stemmed from their desire to further secure their property. Moreover, the proposed fence is a standard chain link fence which lets in both light and air and is virtually identical to a fence already surrounding the entire outer premises of defendants' property and virtually identical to a fence plaintiffs erected.

5. Injunctions § 43 (NCI4th)— injunction denied—bond awarded—insufficient evidence

The trial court erred by awarding defendants the bond posted by plaintiffs under N.C.G.S. § 1A-1, Rule 65(e) without having before it evidence that defendants had incurred any costs or damages arising from the injunction.

Appeal by plaintiffs from judgment entered 11 September 1996 by Judge Russell G. Walker, Jr. in Randolph County Superior Court. Heard in the Court of Appeals on 28 August 1997.

Max D. Ballinger, for plaintiffs-appellants.

Hammond & Hammond, by L.T. Hammond, Jr., for defendants.

WYNN, Judge.

After conveying property to David and Amy Tedder, a dispute arose as to whether Edgar and Nancy Alford had further conveyed an easement over the adjoining property for use by the Tedders. Because the deed did not meet the requirements of the Statute of Frauds in conveying an easement, the evidence was insufficient to show that an easement by implication and necessity existed; and, because the evidence was also insufficient to show that the Alfords put up a "spite fence" between the properties, we affirm the judgment of the trial court in the Al�rds' favor.

This action involves a tract of land located on Uwharrie Road in Randolph County. Originally part of a larger track of land owned by the Al�rds, the proprietors of a trucking business, the tract was sold

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and conveyed by warranty deed from the Alfords to the Tedders on July 12, 1993. The Tedders purchased the land to operate their environmental and industrial services business.

At the time of the conveyance, a chain link fence enclosed the entire outer perimeter of both the tract of land sold to the Tedders and the portion of the property retained by the Alfords. Additionally, a gate in front of the Tedders' tract of land separated the land from Uwharrie Road. And, between two buildings located on opposite sides of the Alfords' property, a "commons area" served as a parking area for the trucks used in the Alfords' business.

Sometime after the conveyance, the Tedders added improvements onto the rear of their original building in order to accommodate their growing business. As their business grew, however, heavy equipment used by the Tedders and their customers began to drive onto the Alfords' adjoining property in order to get to the back of the Tedders' building. Also, on several occasions, the Alfords had some of their trucks and other items stolen as a result of the Tedders' gate being left open by their employees.

Around July of 1993, David Tedder approached the Alfords about purchasing the Alfords' remaining property. However, the resulting negotiations broke down after the Alfords indicated that they would not be interested in selling their remaining property for less than \$250,000.

Thereafter, the Tedders decided to resolve their space problems by relocating the fence in the front of their property to the back of their property. In connection with that work, the Tedders had a gully filled, some swamp area drained, and a gate placed in the fence.

In October of 1995, the Alfords hired Glenola Fence Company to erect a chain link fence along the property line between the parties' property. Upon learning of the Alfords' plans to erect the fence, the Tedders brought this action to enjoin the Alfords from erecting the fence and from denying them access to the commons area and use of the gate.

On January 2, 1996, the Honorable W. Steven Allen, Sr. granted partial summary judgment in favor of the Alfords on the issue of whether an express easement existed in favor of the Tedders and whether the Tedders were entitled to specific performance of an express contract. The remaining matters were tried before the Honorable Russell G. Walker, Jr. in Superior Court of Randolph

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County. At the close of the Tedders' evidence, Judge Walker granted the Alford's motion for a directed verdict upon all remaining issues, including the Tedders claim that they were entitled to an easement by way of implication or necessity, and awarded the Alford's the \$1,500.00 bond posted by the Tedders. The Tedders subsequently filed this appeal.

I.

[1] The Tedders first argue that an issue of fact existed because the subject deed expressly conveyed to them the right to use the gate and commons area on the Alford's property and that there was other evidence before the court from which a reasonable jury could have concluded that an express easement or right-of-way existed in their favor. We disagree.

A defending party is entitled to summary judgment if it can establish that no claim for relief exists or that the claimant cannot overcome an affirmative defense.¹ Here, the Alford's affirmatively plead noncompliance with the Statute of Frauds contending the deed executed between the parties did not memorialize an agreement to convey an easement to the Tedders.

The North Carolina Statute of Frauds provides in pertinent part:

All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them . . . shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith . . .²

As an interest in land, an easement is subject to the statute of frauds.³ Thus, North Carolina law requires that a contract or deed purporting to convey an easement be in writing and that the contents of that writing be proven only by the writing itself, not as the best but as the only admissible evidence of its existence.⁴ The burden of proving that a sufficient writing exists memorializing the conveyance of the easement is on the party claiming its existence.⁵

1. *Wilder v. Hobson*, 101 N.C. App. 199, 201, 398 S.E.2d 625, 627 (1990).

2. N.C. Gen. Stat. § 22-2 (1986).

3. *Prentice v. Roberts*, 32 N.C. App. 379, 383, 232 S.E.2d 286, 288 (1977) (citing *Borders v. Yarbrough*, 237 N.C. 540, 75 S.E.2d 541 (1953); and *Gruber v. Eubank*, 197 N.C. 290, 148 S.E.2d 246 (1929)).

4. See *Severe v. Penny*, 48 N.C. App. 730, 732, 269 S.E.2d 760, 761 (1980).

5. See *Elliot v. Owen*, 244 N.C. 685, 44 S.E.2d 833 (1956).

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Our review of the evidence in the light most favorable to the Tedders reveals that the Tedders did not meet their burden under the statute of frauds. The subject deed contains no record of an agreement between the parties to convey an easement to the Tedders. Nonetheless, the Tedders argue that under the language of the deed, the Alffords conveyed to them “all privileges and appurtenances thereto belonging,” which includes easements. However, that language is no more than the standard language found in most warranty deeds conveying title to land and does not, by itself, serve as a recording of an agreement to convey an easement or right-of-way to the Tedders. Likewise, language at the end of the deed which provides that “[t]his conveyance is made subject to all applicable rights of way, easements and restrictions of record, if any” is also insufficient to support the Tedders contention that an easement was conveyed to them in the deed (emphasis added). That language only makes the conveyed property subject to easements and rights-of-way recorded in the deed itself. Again, we have found no such recording in the deed. There being nothing in the deed evidencing the existence of an easement in this case, we find this issue to be without merit.

II.

The Tedders next argue that the trial court erred by granting a directed verdict because the evidence presented by them at trial was sufficient to permit them to get to the jury on the issue of whether an easement by implication and necessity existed, and on the issue of whether the fence the Alffords planned to erect was a “spite fence.” We disagree.

A. Easement by Implication

[2] For the Tedders to withstand the grant of directed verdict on the issue of whether an easement by implication existed, there must be more than a scintilla of evidence to support each element of the Tedders’ claim.⁶ To establish an easement by implication, a plaintiff must prove that:

- (1) there was a common ownership of the dominant and servient parcels and a transfer which separates that ownership;
- (2) before the transfer, the owner used part of the tract for the benefit of the other part, and that this use was apparent, continuous and permanent; and

6. See *Rice v. Wood*, 82 N.C. App. 318, 346 S.E.2d 205, cert. denied, 318 N.C. 417, 349 S.E.2d 599 (1986).

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- (3) the claimed easement is ‘necessary’ to the use and enjoyment of the claimant’s land.⁷

Once these elements are established, “[a]n ‘easement from prior use’ may be implied to ‘protect the probable expectations of the grantor and the grantee that an existing use of part of the land would continue after the transfer.’ ”⁸

In the instant case, our review of the trial transcript has revealed not a scintilla of evidence upon which a reasonable jury could have concluded that there was any “prior use” of the Tedders’ land as a business. No evidence in the trial record supports a finding that the Tedders used the land deeded to them in any manner *before* title to it was actually separated. Therefore, the trial court correctly directed verdict in favor of the Alford on the issue of whether an implied easement existed from the Tedders’ prior use.

B. Easement by Necessity

[3] Even if their evidence was insufficient to withstand a directed verdict as to their claim of an easement arising by implication, the Tedders claim that they are, nonetheless, entitled to have a jury consider whether they are entitled to access to the Alford’s property by way of an easement arising out of necessity. They contend that evidence presented by them at trial showed that their trucks had no access to their building from the commons area side of their property, and that there was an increased danger to vehicles and persons attempting to enter and leave their property from the gated side of their property.

This court most recently defined an easement of necessity as a right-of-way which arises by implication, in favor of a grantee “who has no access to their land except over other lands owned by the grantor or a stranger.”⁹ To establish the right to use a way of necessity it is not required, however, that the grantee show absolute necessity.¹⁰ It is sufficient that he show such physical conditions

7. *Curd v. Winecoff*, 88 N.C. App. 720, 723, 364 S.E.2d 730, 732 (1988) (quoting *Knott v. Washington Housing Authority*, 70 N.C. App. 95, 98, 318 S.E.2d 861, 863 (1984)).

8. *Id.* (quoting *Knott*, 70 N.C. App. at 97-98, 318 S.E.2d at 863; and P. Glen, *Implied Easements in the North Carolina Courts: An Essay on the Meaning of “Necessary,”* 58 N.C.L. Rev. 223, 224 (1980)).

9. *Cieszko v. Clark*, 92 N.C. App. 290, 295, 374 S.E.2d 456, 459 (1980).

10. *Oliver v. Ernul*, 277 N.C. 591, 599, 178 S.E.2d 393, 397 (1971) (citing *Smith v. Moore*, 254 N.C. 186, 118 S.E.2d 436 (1961)).

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and such uses as would reasonably lead one to believe that the grantor intended him to have the right of access at the time of the conveyance.¹¹

In light of the foregoing principles, we find that the evidence presented by the Tedders at trial was insufficient to support their claim that a way of necessity existed in their favor across the Alford's property. Regardless of the Tedders' evidence that they had no access to the commons area side of their building and that it was more dangerous for their vehicles to drive across their property than it was for them to drive across the Alford's property, the record reveals that the Tedders' trucks had direct access to their property from two public roads—through their own gates and entries on Uwharrie Road and Circle Drive. The Tedders presented no evidence to the contrary, nor did they present evidence that their trucks would cease to have that access unless they were permitted to drive across the Alford's property. Under these circumstances, it cannot reasonably be concluded that the Tedders had no access to their land except over the land of the Alford's, thereby necessitating a right-of-way across the Alford's property.

Furthermore, the record fails to show that the Alford's *intended* for the Tedders to have a continued right of access across their property. The evidence showed that the Tedders "need" to turn their trucks around onto the Alford's property did not arise until after the Tedders constructed the addition to their building. Moreover, and the Tedders use of the Alford's property as a turnaround for their trucks did not begin until well after the Tedders' original tract had been deeded to them by the Alford's. As such, it cannot be reasonably assumed that the Alford's, at the time they conveyed their property to the Tedders, intended for the Tedders to use their property as a turnaround for their trucks. We accordingly hold that the trial court did not err in directing verdict against the Tedders on the issue of the Tedders' right-of-access across defendant's property by way of an easement of necessity.

C. Spite Fence

[4] In assessing the Tedders' argument that there was sufficient evidence presented by them at trial regarding the Alford's plans to erect an alleged "spite fence," we are guided by our Supreme Court's decision in *Barger v. Barringer*.¹² *Barger* involved a case in which the

11. *Id.*

12. 151 N.C. 419, 66 S.E. 439 (1909).

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defendant, for no other purpose except spite, erected a solid fence over 8 feet high which shut out the light, air and view from the plaintiff's home. In deciding that the defendant could not maintain such a fence, the court explained that owners of lands could not erect such improvements as they saw fit if those improvements were made out of spite.¹³ The court concluded that a fence was considered an improvement made out of spite if that fence caused the plaintiff harm for no good reason and there was no useful purpose for that improvement other than defendant's malice.¹⁴

In the instant case, there was no evidence presented by the Tedders which tended to show that the Al�ords' plan to put up a fence on their property was solely motivated by a malicious desire to harm or harass the Tedders. At best, the Tedders' evidence showed that the Al�ords were displeased with the fact that the Tedders were unwilling to buy their property at their desired price, and that the Tedders had stopped using their truck repair service. There was no evidence to support the conclusion that this displeasure was what dictated the Al�ords' decision to erect a fence on their property. To the contrary, the evidence in the record supports the conclusion that the Al�ords' decision to erect the fence stemmed from their desire to further secure their property and business.

We also find it pertinent that unlike the fence in *Barger*, the fence which the Al�ords proposed to erect is a standard chain link fence which lets in both light and air. Furthermore, the fence proposed by the Al�ords is virtually identical to the fence already surrounding the entire outer premises of the Al�ords' property, and is also virtually identical to the fence that the Tedders themselves erected. Given these circumstances, and the fact that the Tedders brought forth no evidence which could raise the inference that the erecting of the proposed fence served no useful purpose other than the Al�ords' malice, we hold that the trial court committed no error in directing verdict against the Tedders regarding the issue of the Al�ords' proposed fence.

III.

[5] By their third assignment of error, the Tedders contend that the trial court erred when it awarded the Al�ords, under Rule 65(e) of the North Carolina Rules of Civil Procedure, the bond posted by the Tedders. With this contention, we agree.

13. *Id.* at 424, 66 S.E. at 441.

14. *Id.* at 424-26, 66 S.E. 441-42.

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Rule 65(e) of the North Carolina Rules of Civil Procedure provides in pertinent part:

An order or judgment dissolving an injunction or restraining order may include an award of damages against the party procuring the injunction and the sureties on his undertaking without a showing of malice or want of probable cause in procuring the injunction. The damages may be determined by the judge, or he may direct that they be determined by a referee or jury.

This rule authorizes a trial court at the conclusion of a case, to order the payment of the bond posted by the party which initially sought to procure the injunction. However, a trial court cannot enter such an order without first determining for itself, or by way of a referee or jury, the damages incurred by the party against whom the injunction was initially entered. The fact that the party against which the injunction was entered prevails at trial, does not, by itself, entitle it to the posted bond. The prevailing party must have also suffered damages as a result of the injunction.

Here, the trial court awarded the bond to the Alfords without having before it any evidence that the Alfords had incurred any costs or damages arising from the injunction. Therefore, the trial court erred when it awarded the Alfords the bond posted by the Tedders.

Finally, we have carefully reviewed the Alfords' final assignment of error regarding certain evidentiary rulings by the trial court, and find it to be unpersuasive. We also find it unnecessary to discuss the Alfords' assignment of error regarding the trial court's refusal to allow them to amend their complaint since we have discerned no error in the trial court' rulings which would merit the granting of a new trial to the Alfords.

Accordingly, the rulings of the trial court are

Affirmed in part, and reversed in part.

Judges GREENE and MARTIN, Mark D., concur.

SLOAN v. MILLER BUILDING CORP.

[128 N.C. App. 37 (1997)]

LANDON W. SLOAN, JR. AND WIFE, PHYLLIS FAY SLOAN, PLAINTIFFS V.
MILLER BUILDING CORPORATION, DEFENDANT

No. COA96-1464

(Filed 2 December 1997)

1. Limitations, Repose, and Laches § 45 (NCI4th)— loss of consortium—derivative action—voluntary dismissal of primary action—statute of limitations tolled

Defendant's motion to dismiss Ms. Sloan's claim as being barred by the statute of limitations was properly denied where Mr. Sloan was injured at a construction site on 21 October 1985; the three year statute of limitations for Ms. Sloan's loss of consortium action would ordinarily have run on 21 October 1988, but Mr. Sloan's action was voluntarily dismissed without prejudice on 10 October 1988; and plaintiffs filed their complaint in this action, including the loss of consortium claim, on 6 October 1989. The effect of the voluntary dismissal was also to extend the time within which Ms. Sloan could assert her derivative cause of action because the action for loss of consortium was required to be joined with the personal injury claim.

2. Negligence § 127 (NCI4th)— construction site—fall from building—no barrier protection—willful or wanton negligence

The trial court did not err in a negligence action arising from an injury at a construction site by denying defendant's motion for directed verdict on the issue of willful or wanton negligence. The legal question presented by defendant's motion for directed verdict is essentially the same as that presented by its motion for summary judgment, where another panel of the Court of Appeals determined that plaintiffs had forecast sufficient evidence of willful and wanton negligence for reasonable jurors to differ on the question of whether the conduct of defendant was sufficient to overcome the bar of plaintiff's contributory negligence. Examining the evidence to see whether it was the same as was forecast at the summary judgment stage, it was sufficient for reasonable jurors to find that defendant was willfully or wantonly negligent.

3. Negligence § 169 (NCI4th)— willful or wanton negligence—instructions

The trial court did not err in a negligence action arising from an injury at a construction site by instructing the jury that it was sufficient to find that defendant's conduct was willful or wanton. The instruction was requested by plaintiff and is a correct statement of the law; it is not required that the jury find that a defendant's conduct be both willful negligence and wanton negligence to overcome the bar of contributory negligence. When a party tenders a written request for an instruction which is legally correct and supported by the evidence, failure to give the instruction is error; moreover, defendant has failed to demonstrate prejudice even if the instruction was unnecessary.

4. Negligence § 82 (NCI4th)— willful or wanton contributory negligence—not pled—directed verdict denied

The trial court did not err in a negligence action arising from a three story fall at a construction site by denying defendant's motion for a directed verdict on the issue of plaintiff's willful or wanton contributory negligence. Defendant pled only contributory negligence, set forth no allegations of fact sufficient to give notice that it was asserting as a defense that Mr. Sloan's conduct amounted to willful or wanton contributory negligence, and plaintiffs expressly objected to trying the issue of willful or wanton contributory negligence. A defendant's failure to plead an affirmative defense ordinarily results in waiver thereof, unless the issue is tried by the express or implied consent of the parties.

5. Negligence § 176 (NCI4th)— fall at construction site—sub-standard barrier removed—intervening negligence instruction—denied

The trial court did not err in a negligence action arising from a three story fall at a construction site by refusing defendant's requested instruction on insulating negligence where the evidence did not support the instruction. While there is evidence that both defendant and a painting contractor were negligent, the painting contractor's negligence in removing and not replacing a substandard protective device was at most a concurring cause and not a superseding intervening cause.

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6. Evidence and Witnesses § 1723 (NCI4th)—injury at construction site—video of building—admission not abuse of discretion

Plaintiff did not show abuse of discretion or prejudice in a negligence action arising from a three story fall at a construction site in the admission of a videotape of the building and the denial of defendant's motion for a new trial.

Appeal by defendant from judgment entered 10 April 1996 and order entered 22 May 1996 by Judge James E. Ragan, III, in New Hanover County Superior Court. Heard in the Court of Appeals 26 August 1997.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., and Marcia Kaye Stewart; Narron O'Hale & Whittington, P.A., by John P. O'Hale, for plaintiff-appellees.

Marshall, Williams & Gorham, L.L.P., by Ronald H. Woodruff, for defendant-appellant.

MARTIN, John C., Judge.

Defendant Miller Building Corporation appeals from a judgment entered upon a jury verdict finding that plaintiff, Landon W. Sloan, Jr., was injured by defendant's willful or wanton negligence and awarding him damages of \$454,000 for his personal injuries and his wife, Phyllis Fay Sloan, damages of \$40,000 for loss of consortium. This case has been previously considered by this Court upon plaintiffs' appeal from an order granting defendant's motion for summary judgment; summary judgment was reversed and the case was remanded for trial. *Sloan v. Miller Bldg. Corp.*, 119 N.C. App. 162, 458 S.E.2d 30, *disc. review denied*, 341 N.C. 652, 462 S.E.2d 517 (1995).

Briefly summarized, and only to the extent necessary to an understanding of the issues raised on appeal, the evidence at trial tended to show that defendant was the general contractor for the Campus Edge Phase II Condominium Project in Wilmington, N.C.; plaintiff was hired by defendant as a subcontractor to complete the exterior carpentry trim on the building. On Monday, 21 October 1985, plaintiff was working on the third floor of the structure. In order to remove himself from the path of other workers who were carrying construction materials, plaintiff backed up and sat on a scaffold at the open edge of the floor while he talked with some other carpenters about

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the work they were doing. The scaffold collapsed and plaintiff fell three floors to the ground, sustaining serious injuries.

The evidence showed that defendant had not placed any standard barrier protection around the perimeter of the third floor as required by OSHA standards; the only barrier protection which had ever been provided consisted of ropes tied to each post around the third floor perimeter. Those ropes had been removed on Saturday, 19 October 1985, by the painting contractor so that the posts could be painted. Neither the painting contractor nor defendant had replaced the ropes or erected any other barrier protection around the perimeter. When plaintiff arrived at work on the following Monday morning, 21 October 1985, he noticed that the ropes had been removed, but he made no effort to replace the ropes nor did he ask defendant to replace them. There was also evidence tending to show that defendant had been cited by OSHA compliance officers on multiple occasions for its failure to provide adequate barrier protection on open sided floors.

I.

[1] Plaintiff Landon Sloan originally filed his complaint against Miller Building Corporation on 11 July 1986; Phyllis Fay Sloan was not a party to that action. Landon Sloan submitted to a voluntary dismissal without prejudice of his claim on 10 October 1988. On 6 October 1989, plaintiffs filed their complaint in this action, which included a claim on behalf of Phyllis Fay Sloan for loss of consortium. Defendant moved to dismiss Phyllis Fay Sloan's claim on the grounds that the claim was barred by the statute of limitations. Defendant's Assignment of Error No. 1 is to the denial of its motion to dismiss Phyllis Fay Sloan's action for loss of consortium.

G.S. § 1-52(5) is the statute of limitations applicable to a spouse's claim for loss of consortium and requires that the claim be brought within three years from the time the cause of action accrues. Under North Carolina law, a spouse's claim for loss of consortium must be joined with the other spouse's claim for personal injury. *Nicholson v. Hugh Chatham Memorial Hospital, Inc.*, 300 N.C. 295, 266 S.E.2d 818 (1980). Our Supreme Court has held that a spouse's cause of action for loss of consortium is not barred by the statute of limitations so long as the original negligence claim of the injured spouse is not so barred. *Wall v. Stout*, 310 N.C. 184, 311 S.E.2d 571 (1984).

In the present case, defendant's allegedly negligent acts occurred on 21 October 1985; the three year statute of limitations for Phyllis

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Sloan's loss of consortium action would ordinarily have run on 21 October 1988. However, on that date, Landon Sloan's cause of action for personal injury was not in existence, having been voluntarily dismissed without prejudice on 10 October 1988, and Phyllis Fay Sloan could not have brought her derivative claim for loss of consortium at that time. When Landon Sloan voluntarily dismissed his original action for personal injury without prejudice, he effectively extended the time within which he could re-file the claim beyond the three year limitation of G.S. 1-52(5). *Whitehurst v. Virginia Dare Transportation Co.*, 19 N.C. App. 352, 198 S.E.2d 741 (1973). Because his spouse's cause of action for loss of consortium was required to be joined with his personal injury claim, we hold that the effect of Landon Sloan's voluntary dismissal was also to extend the time within which Phyllis Fay Sloan could assert her derivative cause of action coextensive with the time within which he could re-file his personal injury claim. Thus, when Landon Sloan re-filed his personal injury claim within the time permitted by G.S. § 1A-1, Rule 41(a), Phyllis Fay Sloan had the right to join with it her derivative cause of action for loss of consortium. Defendant's motion to dismiss was properly denied and its first assignment of error is overruled.

II.

[2] Defendant's Assignment of Error No. 3 is directed to the denial of its motion for directed verdict on the issue of its willful or wanton negligence. Defendant contends there was insufficient evidence of willful and wanton negligence to overcome the bar of Landon Sloan's recovery by reason of his own contributory negligence and that the issue should not have been submitted to the jury.

In its opinion in the previous appeal of this case, another panel of this Court determined that at the summary judgment stage of the proceeding plaintiffs had forecast sufficient evidence of willful and wanton negligence on the part of Miller Building Corporation so that "reasonable jurors could differ on the question of whether the conduct of defendant . . . constituted willful or wanton misconduct sufficient to overcome the bar of Sloan's contributory negligence." *Sloan*, at 169, 458 S.E.2d at 34. Where an appellate court decides questions and remands a case for further proceedings, its decisions on those questions become the law of the case, both in the subsequent proceedings in the trial court and upon a later appeal, where the same facts and the same questions of law are involved. *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E.2d 181 (1974).

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The legal question presented by defendant's motion for directed verdict is essentially the same as that presented by its motion for summary judgment, i.e., "whether there is sufficient evidence to sustain a jury verdict in [plaintiff's] favor . . . or to present a question for the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991). Therefore, we must look to see if the evidence of defendant's willful or wanton negligence presented at the trial of this case was the same as was forecast at the summary judgment stage.

In reversing summary judgment, the court held that plaintiffs had shown sufficient evidence to establish a jury issue as to defendant's willful or wanton negligence by forecasting evidence that Miller lacked basic safety procedures at the job site where plaintiff was injured; that it had been indifferent to, and had failed to comply with, OSHA standards for standard railings or their equivalent barrier protection on that job site; and that defendant had a pattern of noncompliance with, and conscious disregard of, OSHA standards on its other job sites, including those standards relating to safety railings.

At trial, plaintiffs offered evidence that defendant was aware of its obligation to erect standard safety railings on open floors; defendant's safety consultant testified that it was the general contractor's responsibility to erect proper barrier protection and that ropes tied to beams were not sufficient. Defendant's superintendent on the Campus Edge job, who was also the job's safety coordinator, had received a report a month before plaintiff's accident indicating the lack of railings, but had taken no remedial action. Plaintiffs also offered evidence tending to show that defendant had, in the two and one-half year period prior to plaintiff's injury, been cited by OSHA inspectors on seven occasions for failure to have guardrails on open sided floors. Phase One of the Campus Edge project had been cited for not having guardrails in May 1984. There was also evidence tending to show that a previous subcontractor had requested that defendant provide material for a guardrail when he reached the second floor of the building and that defendant had refused the request. The rope barrier, which did not meet OSHA regulations, was put in place only after construction had reached the third floor.

Considering the evidence in the light most favorable to plaintiffs, as is required when ruling upon a defendant's motion for directed verdict, we hold it sufficient for reasonable jurors to find that defendant was willfully or wantonly negligent. *See Estate of Smith v.*

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Underwood, 127 N.C. App. 1, 12, 487 S.E.2d 807, 815 (1997) (directed verdict should be granted only if the trial judge could properly conclude that no reasonable juror could find for plaintiffs). The trial court properly denied defendant's motion for directed verdict.

[3] In a related assignment of error, defendant's Assignment of Error No. 7, defendant contends the trial court erred by instructing the jury as follows:

Now, you need not find that the defendant's conduct was willful and wanton. It is sufficient that you find that the defendant's conduct was either willful or wanton under the definitions I just gave to you.

The instruction was requested by plaintiff and is a correct statement of the law. Willful negligence arises from the tortfeasor's deliberate breach of a legal duty owed to another, while wanton negligence is "done of a wicked purpose or . . . done needlessly, manifesting a reckless indifference to the rights of others." *Siders v. Gibbs*, 39 N.C. App. 183, 187, 249 S.E.2d 858, 861 (1978). It is not required that the jury find that a defendant's conduct be both willful negligence and wanton negligence to overcome the bar of contributory negligence; it is sufficient that defendant's conduct amount to either an intentional failure to perform a duty or a reckless neglect to perform such duty. See *Sloan*, 119 N.C. App. 162, 458 S.E.2d 30 (1995); *Lewis v. Brunston*, 78 N.C. App. 678, 338 S.E.2d 595 (1986). When a party tenders a written request for an instruction which is legally correct and supported by the evidence, failure to give the instruction is error. *Bass v. Hocutt*, 221 N.C. 218, 19 S.E.2d 871 (1942). Moreover, defendant has failed to demonstrate how the instruction, even if unnecessarily given, could have possibly been prejudicial. This assignment of error is overruled.

III.

[4] In its Assignments of Error No. 4 and 5, defendant asserts the trial court erred in denying defendant's motion for a directed verdict on the issue of plaintiff's willful or wanton contributory negligence and in failing to submit this issue to the jury. We do not agree.

A defendant's failure to plead an affirmative defense ordinarily results in waiver thereof, unless the issue is tried by the express or implied consent of the parties. N.C. Gen. Stat. § 1A-1, Rule 15(b) (1990); *Nationwide Mut. Ins. Co. v. Edwards*, 67 N.C. App. 1, 312 S.E.2d 656 (1984). Affirmative defenses which are required to be specifically pleaded include contributory negligence "and any other

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matter constituting an avoidance or affirmative defense." N.C. Gen. Stat. § 1A-1, Rule 8(c) (1990).

In this case, plaintiffs' amended complaint alleged, *inter alia*, defendant's willful and wanton negligence. In its answer to the amended complaint, defendant pleaded only plaintiff's contributory negligence and set forth no allegations of fact sufficient to give notice that it was asserting, as a defense, that plaintiff's conduct had amounted to willful or wanton contributory negligence. Plaintiffs expressly objected to trying the issue of willful or wanton contributory negligence. Therefore, the trial court did not err in denying defendant's motion for a directed verdict based on plaintiff's willful or wanton contributory negligence or in refusing defendant's request to submit the issue to the jury.

IV.

By its Assignment of Error No. 8, defendant asserts the trial court erred in denying its motion for judgment notwithstanding the verdict. Defendant relies on the arguments made in support of its Assignments of Error No. 3 and 4, which we have considered and rejected in Sections II and III above. For the same reasons, we find no error in the trial court's denial of defendant's motion for judgment notwithstanding the verdict.

V.

[5] By its Assignment of Error No. 6, defendant contends the trial court erred in refusing defendant's request that the jury be instructed with respect to insulating negligence. Defendant argues that any negligent act on its part was insulated by the painting contractor's removal of the rope barrier, and that another subcontractor could have removed a brace from the scaffold upon which plaintiff sat, causing it to collapse.

Insulating negligence is "a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote." *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 236, 311 S.E.2d 559, 566 (1984), (quoting *Harton v. Telephone Co.*, 141 N.C. 455, 462-63, 54 S.E. 299, 301-02 (1906)). "It is not to be invoked as determinative merely upon proof of negligent conduct on the part of each of two persons, acting independently, whose acts unite to cause a single injury." *Id.*

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The trial court need only give a requested instruction which is supported by the evidence. *State v. Cummings*, 346 N.C. 291, 488 S.E.2d 550 (1997). In this case the evidence does not support an instruction concerning "insulating acts of negligence." While there is evidence that both defendant and the painting contractor were negligent, the painting contractor's negligence was not a superseding intervening cause. Defendant's negligence consisted of its failure to erect proper barrier protection and its failure to inspect the building to determine whether proper safety measures were in effect; negligence which remained active until the moment of plaintiff's injury. The painting contractor's act of removing and not replacing the rope barrier, a substandard protective device, was not a new and independent proximate cause of plaintiff's fall, but, at most, a concurring cause. In addition, the burden was upon defendant to prove that its own negligence was insulated by the negligent act of another. There was no evidence that any subcontractor actually removed a brace from the scaffolding upon which plaintiff sat or that such a brace was removed at all, only speculation that it could have happened. That is not sufficient evidence of negligence to require an instruction on insulating negligence. *Petty v. City of Charlotte*, 85 N.C. App. 391, 355 S.E.2d 210 (1987).

VI.

[6] Finally, we have carefully considered defendant's assignments of error relating to the admission of a videotape of the building where the plaintiff fell (Assignment of Error No. 2), and the denial of defendant's motion for a new trial (Assignment of Error No. 9). Each of these rulings to which defendant assigns error was addressed to the sound discretion of the trial court and may be disturbed on appeal only where an abuse of such discretion is clearly shown. *Campbell v. Pitt County Memorial Hosp. Inc.*, 84 N.C. App. 314, 352 S.E.2d 902, *affirmed*, 321 N.C. 260, 362 S.E.2d 273 (1987) (admissibility of videotape within sound discretion of trial court; discretionary order denying G.S. § 1A-1, Rule 59 motion for a new trial may be reversed only for manifest abuse of discretion). See *Anderson v. Hollifield*, 345 N.C. 480, 480 S.E.2d 661 (1997) (appellate review of trial court's discretionary ruling granting or denying motion for new trial is limited to determination of whether record affirmatively shows abuse of discretion). Defendant has shown neither prejudice from the admission of the videotape nor any abuse of the trial court's discretion in either ruling.

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No error.

Judges EAGLES and TIMMONS-GOODSON concur.

CHARLES I. TAYLOR, PLAINTIFF v. SHARON S. COLLINS, THOMAS W. HENSON, JR.,
ROBERT L. FUERST, HENSON & FUERST, P.A., DEFENDANTS

No. COA97-48

(Filed 2 December 1997)

1. Pleadings § 63 (NCI4th)— Rule 11 sanctions—timeliness of motion

The imposition of Rule 11 sanctions against the attorney for a husband in a domestic action was not untimely and barred by principles of res judicata and judicial economy where the motion was filed following decisions on the appeal of summary judgment for defendant-wife in an action for malicious prosecution, abuse of process, intentional infliction of emotional distress, and interference with contract based upon a TRO to freeze assets in the domestic action. It has been held that it is proper for a trial court to consider Rule 11 sanctions without regard to whether the adversary proceedings are continuing when the motion is filed, and respondents point to no authority suggesting that it was error for the trial court to entertain a motion for sanctions after the appeal.

2. Pleadings § 63 (NCI4th)— action filed after release—Rule 11 sanctions—supported by evidence

The imposition of Rule 11 sanctions against an attorney was upheld where the client and his wife had signed a separation agreement which included a mutual release and the attorney subsequently signed a complaint for abuse of process, emotional distress, and other claims arising from a TRO issued during the divorce proceedings. The evidence supported the trial court's findings and conclusions that the complaint signed by the attorney was not well-grounded in fact or law.

3. Pleadings § 61 (NCI4th)— Rule 11 sanctions—imposed upon client—good faith reliance on attorney

The trial court erred by issuing Rule 11 sanctions against the client in a domestic action where the client and his attorney

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filed an action for malicious prosecution, emotional distress, and other claims after signing a separation agreement which included a mutual release. The attorney admits that the client relied on his advise as to the legal and factual sufficiencies of the action. The client relied on the attorney in good faith regarding the legal sufficiency of his claims and thus met his duty of reasonable inquiry.

4. Pleadings § 64 (NCI4th)— Rule 11 sanctions—payment within 30 days

The trial court did not abuse its discretion by requiring that Rule 11 sanctions be paid within thirty days.

Appeal by respondents Charles Taylor and Brett Hubbard from orders entered 31 May 1996 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 16 September 1997.

Brett A. Hubbard for respondent-appellant.

Dill, Fountain, Hoyle & Pridgen, L.L.P., by William S. Hoyle, for movants-appellees.

WALKER, Judge.

Charles Taylor (Taylor) and Sharon Collins (Collins) were married to each other on 12 February 1984 and were later separated and divorced. Prior to the divorce, Collins, represented by Henson & Fuerst, P.A. (Henson & Fuerst), filed suit against Taylor for divorce from bed and board, alimony and equitable distribution. Collins obtained a temporary restraining order (TRO) to prevent Taylor from disposing of marital assets pending resolution of the lawsuit. On 27 November 1989, Collins and Taylor executed a separation agreement which contained a section entitled "MUTUAL RELEASE," whereby both parties released and discharged the other from all causes of action, claims, rights or demands which either ever had against each other arising out of the marriage.

On 18 September 1992, Taylor filed suit against Collins, Henson & Fuerst, Thomas W. Henson, Jr., individually, and Robert L. Fuerst, individually, alleging malicious prosecution, abuse of process, intentional infliction of emotional distress, and interference with contract, all based upon the issuance of the TRO. On 18 January 1994, summary judgment was granted in favor of Collins and her attorneys. This

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Court affirmed the trial court's award of summary judgment. Both a petition for discretionary review and a motion for reconsideration were denied by our Supreme Court.

Following the decisions of the Supreme Court, Collins and her attorneys filed motions in the cause requesting sanctions against Taylor and Hubbard (respondents). After a hearing on the motions, the trial court imposed sanctions against respondents, jointly and severally, ordering them to pay: (1) \$16,494.11 to Collins, representing attorney's fees and costs incurred by Collins in defending the lawsuit filed by respondents, (2) \$4,860.00 to Collins, the total sum imposed as sanctions for the violation of N.C. Gen. Stat. § 1A-1, Rule 11, and (3) \$20,011.15 to Thomas Henson, Jr., Robert L. Fuerst and Henson & Fuerst, P.A., representing attorney's fees and costs incurred in defending the lawsuit filed by respondents, which the court imposed as sanctions for the violations of N.C. Gen. Stat. § 1A-1, Rule 11.

In reviewing a trial court's award of sanctions under Rule 11, this Court shall "conduct a de novo review" to determine the following:

(1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by [the] sufficiency of the evidence.

Lowder v. All Star Mills, 103 N.C. App. 500, 501, 405 S.E.2d 774, 775, disc. review denied, 330 N.C. 196, 412 S.E.2d 678 (1991) (citing *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989)).

[1] Respondents first argue that the imposition of sanctions was untimely and barred by principles of res judicata and judicial economy.

In *VSD Communications, Inc. v. Lone Wolf Publishing Group*, 124 N.C. App. 642, 478 S.E.2d 214 (1996), this Court, in determining whether it was proper for a trial court to consider Rule 11 sanctions after plaintiff had voluntarily dismissed its claims without prejudice, noted:

These motions have a life of their own and they address the propriety of the adversary proceedings that have previously occurred in the case without regard to whether the adversary proceedings in question are continuing when the motion for fees is filed.

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Id. at 644, 478 S.E.2d at 216. Further, respondents have pointed to no authority which suggests that it was error for the trial court to entertain a motion for sanctions after their appeal to this Court. Thus, we find no merit in respondents' argument that the trial court's imposition of sanctions was untimely. *See also, Dodd v. Steele*, 114 N.C. App. 632, 442 S.E.2d 363, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994).

[2] Respondents' next two assignments of error relate to the appropriateness of Rule 11 sanctions. We will address these assignments of error as they relate to each individual respondent, beginning with Hubbard.

N.C. Gen. Stat. § 1A-1, Rule 11 (1990) provides in pertinent part:

(a) *Signing by Attorney.*—Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

This Court, in determining whether "the complaint meets the factual certification requirement," must analyze:

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(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact.

McClerin v. R-M Industries, Inc., 118 N.C. App. 640, 644, 456 S.E.2d 352, 355 (1995). (For a discussion of the analysis of the legal sufficiency prong, see *McClerin*, 118 N.C. App. 640, 456 S.E.2d 352; *Mack v. Moore*, 107 N.C. App. 87, 418 S.E.2d 685 (1992)).

With respect to Hubbard, the trial court found the following:

4. That prior to filing of said action, and specifically on November 27, 1989, Charles I. Taylor and Sharon S. Collins executed a Separation Agreement, which agreement contained a mutual release, releasing and discharging each other of and from all causes of action, claims, rights, or demands whatsoever in law or in equity either party had against the other.

5. That prior to the filing of the lawsuit by Charles I. Taylor and his attorney, Brett A. Hubbard, Taylor and Hubbard both were aware of the Separation Agreement executed by Taylor and Collins and the mutual release contained therein, but failed to specifically refer to said Separation Agreement in their Complaint, referring only to a "settlement" entered into by the parties in November, 1989; the Respondents admitted that the "settlement" included the Separation Agreement; that the Complaint failed to plead any ground alleging insufficiency of the Separation Agreement and contained no allegation of fraud, mutual mistake, duress, illegality or undue influence in the execution of the Separation Agreement such as to avoid the terms of said Agreement and mutual release provision.

...

9. That Brett A. Hubbard, attorney at law, signed a pleading (the complaint) and thereby certified as an attorney and on behalf of his client, Charles I. Taylor, that he had conducted a reasonable inquiry into the facts to support the pleading; that he had conducted a reasonable investigation into the law so that the complaint embodied existing legal principles or a good faith argument for the extension, modification, or reversal of existing legal principles; and that the complaint was not interposed for any improper purpose.

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The trial court then concluded:

3. The Complaint filed by Charles I. Taylor was signed by Taylor and his attorney, Brett A. Hubbard, and said pleading failed the factual certification required by N.C.G.S. 1A-1, Rule 11.
4. That the Complaint filed by Taylor and his attorney, Brett A. Hubbard, failed the legal certification required by N.C.G.S. 1A-1, Rule 11.

Based on the foregoing conclusions, the trial court imposed sanctions on Hubbard as described above.

At the time the complaint was filed, existing law provided that:

Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects. . . .

N.C. Gen. Stat. § 52-10.1 (1991). Further, this Court in *Sedberry v. Johnson*, 62 N.C. App. 425, 429, 302 S.E.2d 924, 927, *disc. review denied*, 309 N.C. 322, 307 S.E.2d 167 (1983), stated “[t]o restore to one party, subsequent to the death of the other, rights bargained away in the separation agreement, would deny the agreement its intended ‘full and final’ effect, in contravention of the policy that such agreements ‘shall be legal, valid, and binding in all respects.’ ”

The separation agreement at issue here provided:

MUTUAL RELEASE. Subject to the provisions of this agreement, each party has released and discharged and by this agreement does for himself, and his and her heirs, legal representatives, executors, administrators, and assigns, release and discharge the other of and from all causes of action, claims, rights, or demands whatsoever in law or in equity . . . which either party ever had or now has against the other or the estate of the other, arising from or existing because of said marriage. . . .

All the evidence presented showed that Hubbard was familiar with the separation agreement before filing the complaint against Collins and her attorneys. In fact, the complaint alleges, “The Plaintiff settled the actions with Defendants and the action was dismissed on November 28, 1989, after the Plaintiff signed a settlement in the office of the defendant attorneys.”

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Respondents now argue that if the release had said “all causes of action,” its bar of all claims between Taylor and Collins would have been clear and no action would ever have been brought against Collins, but since the release contained the limiting language, “arising from or existing because of the marriage,” the claims now asserted by respondents are outside the scope of the release. We disagree. It is clear that the actions filed by Taylor were based on the injunctive relief obtained by Collins and therefore arose from or existed because of the marriage.

Nevertheless, respondents contend the language of the release does not apply to Collins’ attorneys. Respondents cite no authority in support of this argument and we find nothing in the record to indicate that Collins’ attorneys were acting outside the scope of their representation. As such, we find this evidence supports the trial court’s findings and conclusions that the complaint signed by Hubbard was not well-grounded in fact or law. Thus, we uphold the imposition of Rule 11 sanctions against Hubbard.

[3] We now address the issue of whether the imposition of sanctions against Taylor, a represented party, were appropriate.

With respect to respondent Taylor, the trial court found:

6. That after the lawsuit was filed by Charles I. Taylor, the parties were deposed; that in his deposition, Taylor acknowledged that he had read and understood the entire Separation Agreement and that, specifically, with reference to the release provision, it was his intention that he “wanted it to be over with. I didn’t want her to be able to come back against me for anything else. I wanted it to be permanent;” in addition, Taylor testified that he had suffered no losses or damages and had seen no physician with respect to his alleged emotional distress.

The trial court then concluded that the complaint filed by Taylor failed both the factual and legal certifications required by Rule 11 and imposed sanctions against Taylor.

In *Bryson v. Sullivan*, 330 N.C. 644, 656, 412 S.E.2d 327, 333 (1992), our Supreme Court determined “the relevant inquiry is . . . whether the client made a reasonable inquiry to determine the legal sufficiency of the document.” The Court, in defining what would constitute a “reasonable inquiry,” stated:

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[T]he good faith reliance of [plaintiffs], as represented parties, on their attorneys' advice that their claims were warranted under the law is sufficient to establish an objectively reasonable belief in the legal validity of their claims.

Id. at 662, 412 S.E.2d at 336-37.

The trial court did not make a finding as to whether Taylor relied in good faith on Hubbard's advice regarding the legal sufficiency of the claim. However, Hubbard frankly admits that at all times, Taylor relied on his advice as to the legal and factual sufficiencies of the action.

In light of this evidence, we find that Taylor in good faith relied on Hubbard regarding the legal sufficiency of his claims and thus met his duty of making a "reasonable inquiry." As such, the trial court's imposition of sanctions against Taylor was improper. *See Bryson*, 330 N.C. 644, 412 S.E.2d 327.

[4] Respondents last argue that the trial court abused its discretion in requiring the sanctions to be paid within thirty days from the entry of the judgment.

"[I]n reviewing the appropriateness of the particular sanction imposed, an 'abuse of discretion' standard is proper." *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989)). This standard is intended to give considerable leeway to the trial court in the imposition of sanctions under Rule 11. *Brown v. Brown*, 112 N.C. App. 614, 617, 436 S.E.2d 404, 406 (1993). Respondents have cited no authority in support of their assertion that the trial court abused its discretion. Absent a showing of abuse, we will not disturb the particular sanctions imposed by the trial court in this case.

The order of the trial court imposing sanctions under Rule 11 against respondent Hubbard is affirmed. The order imposing sanctions under Rule 11 against respondent Taylor is reversed.

Affirmed in part and reversed in part.

Judges WYNN and SMITH concur.

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DARNELL G. HANLEY, PLAINTIFF V. JAMES F. HANLEY, DEFENDANT

No. COA97-116

(Filed 2 December 1997)

1. Divorce and Separation § 261 (NCI4th)— wife's abandonment of husband—evidence supporting finding

The trial court did not err by finding that plaintiff wife abandoned defendant husband where there was evidence tending to show that the wife left her family and stayed in Hawaii for two months; she told the husband that she didn't know how long she would be in Hawaii and that it was okay if he was here when she got back and it was okay if he wasn't here; the parties never resumed cohabitation after the wife went to Hawaii; the wife had previously expressed her unhappiness with the marriage; although the husband did not try to prevent the wife from going to Hawaii, he did not consent to ending the marital cohabitation; the wife purchased a car in Hawaii; and the wife did not notify the husband of her return from Hawaii, but he found out from a friend.

2. Divorce and Separation § 269 (NCI4th)— denial of alimony to wife—abandonment—consideration of additional factors

The trial court did not use the wife's marital misconduct (abandonment of the husband) as the sole basis for denying the wife alimony but properly considered the economic factors set forth in N.C.G.S. § 50-16.3A where the court also found that the husband is sharing his retirement with the wife in addition to a \$75,000 property settlement; the wife has a degree in industrial art education and has a current earning capacity of approximately \$24,000 per year; the wife had \$39,000 in cash at the time of the hearing; the husband is paying the wife \$600 per month in "family support" until both children graduate from high school; the husband paid all of the marital debt, including charges by the wife when she left the family and went to Hawaii for two months; the husband continues to support the minor children; the wife has not provided any support for the son who resides with the husband, but has provided some financial assistance for the daughter; and the husband pays for the daughter's schooling and automobile expenses and provides her spending money.

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[128 N.C. App. 54 (1997)]

Appeal by plaintiff from orders entered 16 September and 20 September 1996 by Judge Fred M. Morelock in Wake County District Court. Heard in the Court of Appeals 21 October 1997.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell and Cary E. Close, for plaintiff-appellant.

Gary S. Lawrence and Allison M. Matthews for defendant-appellee.

WALKER, Judge.

Plaintiff and defendant were married on 4 January 1975 and separated on 30 March 1995. The parties had two children during the marriage: Anna Collins Hanley, born 31 May 1979, and James F. Hanley, Jr., born 20 April 1981.

During the marriage, defendant worked for several banks and then for Stan Taylor Insurance Agency, where he became part owner in 1991. Defendant's gross income, separate and apart from his ownership interest in the company, had grown from nearly \$80,000 in 1991 to \$132,000 in 1995.

After the parties married, the plaintiff received a degree in Industrial Art Education and worked for the Wake County School System as a full-time teacher for three years. After the birth of the parties' first child, the plaintiff did not work for a number of years. After the birth of the parties' second child, the plaintiff worked part-time as a substitute teacher and held other various part-time jobs. From 1993 through 1995, plaintiff worked at Alcatel twenty hours a week earning \$10.00 an hour.

In early 1995, prior to the separation, the parties and their children went on a trip to Hawaii. The original itinerary was that the entire family would return together; however, while there, plaintiff met some people and wanted to stay on for a few extra days. The daughter stayed with plaintiff in Hawaii for an extra three days while the defendant and the son returned home.

Shortly after plaintiff's return to Raleigh, she expressed her desire to return to Hawaii for an undetermined period of time. Approximately ten days after returning, plaintiff left again for Hawaii, purchasing tickets with defendant's credit card. Plaintiff informed defendant that, "I do not know how long I will be gone. If you are here when I get back, that is okay. If you are not here when I get back, then

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that is okay." Plaintiff spent approximately two months in Hawaii, purchasing several items on defendant's credit card and also purchasing a car.

According to the plaintiff, when she returned to Raleigh she was met with anger and a cold and indifferent attitude by defendant who said he "didn't want to continue with the marriage." Eventually, plaintiff obtained other housing and the parties executed a separation agreement which provided, among other things, that defendant would pay plaintiff \$600.00 a month in "family support" until the children graduated from high school.

Plaintiff filed this action seeking post-separation support, permanent alimony, and attorney's fees. Defendant denied all claims and counterclaimed for custody and child support. At the hearing on plaintiff's alimony claim, the trial court found that plaintiff had abandoned defendant without just cause or excuse and entered an order denying her claims for permanent alimony and attorney's fees. The trial court subsequently rejected plaintiff's motion to the trial court to make additional findings of fact and amend its judgment.

[1] Plaintiff first contends that the trial court erred in finding that plaintiff abandoned defendant as there was no evidence in the record to support this conclusion.

Abandonment occurs where one spouse brings the cohabitation to an end (1) without justification, (2) without consent, and (3) without intention of renewing the marital relationship. *Pruett v. Pruett*, 247 N.C. 13, 23, 100 S.E.2d 296, 303 (1957); *see also, Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E.2d 387 (1971); *Powell v. Powell*, 25 N.C. App. 695, 214 S.E.2d 808 (1975).

It is undisputed that the parties never resumed cohabitation after plaintiff returned to Hawaii. Further, plaintiff does not contend she was justified in leaving Raleigh and returning to Hawaii. We find the first prong of the definition of abandonment (the bringing about of the end of cohabitation was unjustified) has been met.

We next examine whether the evidence presented supports the second prong of the test for abandonment—whether the defendant gave his consent to the end of the cohabitation.

Plaintiff argues that if she is deemed to have brought the parties' marital cohabitation to an end, it was with the defendant's implied consent as he did not communicate his objection to plaintiff.

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In *Sauls v. Sauls*, 288 N.C. 387, 218 S.E.2d 338 (1975), the defendant husband argued that the trial court was incorrect in awarding alimony to the plaintiff wife on the grounds of abandonment. There, the defendant contended that the plaintiff had consented to the separation and thus it could not be deemed abandonment. *Id.* at 390, 218 S.E.2d at 340. Our Supreme Court remanded the case for a trial *de novo*, finding there was insufficient evidence in the record to determine if the trial court's conclusion could be supported. *Id.* at 391, 218 S.E.2d at 341. The Court did, with regard to the issue of consent, state the following:

Mere acquiescence in a wrongful and inevitable separation, which the complaining spouse could not prevent after reasonable efforts to preserve the marriage, does not make the separation voluntary or affect the right to divorce or alimony. Nor, under such circumstances, is the innocent party obliged to protest, to exert physical force or other importunity to prevent the other party from leaving.

Id. at 390, 218 S.E.2d at 341 (citations omitted).

Included in the trial court's findings was that "defendant has never been a controlling person and his belief was that if the plaintiff wanted to leave the family and return to Hawaii, then he should not stop her from doing so." Further, there was evidence that plaintiff had previously expressed her displeasure with defendant and unhappiness with the marriage. Defendant testified that while he did not want plaintiff to return to Hawaii, he was not going to "keep her from doing something she says she really needs or wants to do." Thus, while defendant did not outwardly "protest" or "exert physical force" to prevent plaintiff from leaving, it is clear from the evidence that he did not consent to ending the marital cohabitation.

Finally, we must examine whether there was sufficient evidence to support a finding that the plaintiff returned to Hawaii "without the intent to renew the marital relationship."

"The trial court's findings are conclusive if supported by any competent evidence, even when the record contains evidence to the contrary." *Ellinwood v. Ellinwood*, 94 N.C. App. 682, 685, 381 S.E.2d 162, 164 (1989). "Moreover, since there is no all-inclusive definition as to what will justify abandonment, each case must be determined in large measure upon its own circumstances." *Tan v. Tan*, 49 N.C. App. 516, 521, 272 S.E.2d 11, 15 (1980), *disc. review denied*, 302 N.C. 402, 279

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S.E.2d 356 (1981). Therefore, even though plaintiff testified that she only returned to Hawaii so that she might have some time to herself and that upon her return to Raleigh she immediately went to the marital home with the intent to remain there, other facts would support a finding that when plaintiff left, she did so without the intent of renewing the marital relationship. For example, plaintiff regarded the status of the marriage with indifference and had previously expressed her unhappiness with defendant. She left for Hawaii without indicating when or if she intended to return. Also, plaintiff purchased a car while in Hawaii suggesting her trip was more than just a vacation. Further, defendant testified that plaintiff did not notify him of her return, but instead he found out from a friend. This evidence clearly indicates that when plaintiff returned to Hawaii she did so without the intent of returning and resuming the marital relationship. Thus, the trial court did not err in finding that plaintiff abandoned defendant.

[2] Plaintiff next argues that the trial court abused its discretion in denying her claim for alimony without considering all relevant factors under N.C. Gen. Stat. § 50-16.3A (1995) which provides in pertinent part:

(a) Entitlement.—In an action brought pursuant to Chapter 50 of the General Statutes, either party may move for alimony. The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependant spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section.

. . .

(b) Amount and duration.—The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including:

- (1) The marital misconduct of either of the spouses . . . ;
- (2) The relative earnings and earning capacities of the spouses;
- (3) The ages and the physical, mental, and emotional conditions of the spouses;

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- (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
 - (5) The duration of the marriage;
 - (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
 - (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
 - (8) The standard of living of the spouses established during the marriage;
 - (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
 - (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
 - (11) The property brought to the marriage by either spouse;
 - (12) The contribution of a spouse as homemaker;
 - (13) The relative needs of the spouses;
 - (14) The federal, State, and local tax ramifications of the alimony award;
 - (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
- (c) Findings of Fact.—The court shall set forth the reasons for its award or denial of alimony. . . .

Moreover, N.C. Gen. Stat. § 50-16.1A(3)(c) (1995) includes “[a]bandonment of the other spouse” within its definition of “marital misconduct.”

The trial court found that plaintiff was the dependent spouse and defendant was the supporting spouse; however, after considering all relevant factors listed in the statute, the court concluded an award of alimony would not be equitable.

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Plaintiff argues that the trial court abused its discretion by ignoring all the economic factors listed in N.C. Gen. Stat. § 50-16.3A and instead used plaintiff's marital misconduct (abandonment) as the sole basis for denying plaintiff alimony.

In addition to the trial court's finding that plaintiff abandoned the defendant, the court also made findings with regard to other factors which support its conclusion that alimony would not be equitable. For instance, the trial court found: defendant is sharing his retirement plan with plaintiff, in addition to a \$75,000 property settlement; plaintiff has a degree in Industrial Art Education and has a current earning capacity of approximately \$24,000 a year; plaintiff had \$39,000.00 in cash at the time of the hearing; defendant is paying plaintiff \$600.00 in "family support" until both children graduate from high school; defendant paid all of the marital debt, including plaintiff's charges in Hawaii; defendant has and continues to support the two minor children; plaintiff has not provided any support for the son who still resides with the defendant, although she has provided some financial assistance for the daughter; and defendant pays for the daughter's schooling and automobile expenses, as well as providing spending money.

It is apparent that the trial court considered all relevant factors, not merely plaintiff's marital misconduct, and did not abuse its discretion in determining that an award of alimony was not equitable under these circumstances.

The order of the trial court is

Affirmed.

Judges WYNN and SMITH concur.

WATSON v. BEN GRIFFIN REALTY AND AUCTION

[128 N.C. App. 61 (1997)]

KENNETH RAY WATSON, SR. AND MARTHA S. WATSON, PLAINTIFFS V. BEN GRIFFIN REALTY AND AUCTION, INC. AND CARPENTER, WILSON, CANNON, & BLAIR, P.A., DEFENDANTS

No. COA97-186

(Filed 2 December 1997)

1. Judgments § 530 (NCI4th)— nonparty—Rule 60 motion inappropriate

A nonparty may not seek relief under Rule 60 from a judgment which declared that an easement existed on the nonparty's land. The only manner in which the nonparty may seek relief from the judgment is to file an independent action attacking the judgment. N.C.G.S. § 1A-1, Rule 60.

2. Appeal and Error § 64 (NCI4th)— nonparty—no right to appeal

A nonparty to an action may not appeal from the judgment of the trial court.

Judge WALKER concurring.

Appeal by movant Emma Wilcox from the denial of her N.C. Gen. Stat. § 1A-1, Rule 60 motion to set aside as void, a judgment entered 7 January 1997 by Judge Claude S. Sitton in Caldwell County Superior Court. Heard in the Court of Appeals 7 October 1997.

Wilson, Palmer & Lackey, P.A., by W. C. Palmer and Timothy J. Rohr, for movant appellant.

Todd, Vanderbloemen and Brady, P.A., by Bruce W. Vanderbloemen, for Ben Griffin Realty and Auction, Inc., defendant appellee.

Patrick, Harper, & Dixon, by Stephen M. Thomas, for Carpenter, Wilson, Cannon & Blair, P.A., defendant appellee.

SMITH, Judge.

On 25 April 1989, Ben Griffin Realty and Auction, Inc. (hereinafter "Griffin"), as owner, offered for sale 4.876 acres of land to plaintiffs Kenneth and Martha Watson. Agent Ben Griffin told plaintiffs that "the old farm road" was the access to the property. Around 1 May 1989, defendant Carpenter, Wilson, Cannon & Blair, P.A. (hereinafter "law firm"), issued a title opinion which stated that the property had

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a direct means of access to the public right of way. Based on the representations of Griffin and the law firm, plaintiffs paid \$12,000 for the property.

Emma Wilcox (hereinafter "Wilcox") owns property adjoining plaintiffs' property. The "old farm road" passes over Wilcox's property from a nearby public road. The "old farm road" was the exclusive means of access to plaintiffs' property. Subsequent to plaintiffs' purchase, they discovered that there was no recorded or otherwise enforceable right of way in favor of plaintiffs' property.

On 28 August 1992, plaintiffs Kenneth and Martha Watson filed suit in Caldwell County (92 CVS 1044) against Wilcox and others for trespassing on plaintiffs' property, intentional infliction of emotional distress, and punitive damages. In that action, plaintiffs in the instant case alleged that no currently enforceable easement existed across the Wilcox property. On four separate occasions during that action, plaintiff Kenneth Watson failed to appear for various agreed to and noticed depositions. In October 1993, Superior Court Judge Robert D. Lewis dismissed that action. Thereafter in a separate action (93 CVS 1604), Wilcox sued the Watsons for trespass. On 17 February 1994, Superior Court Judge Jesse B. Caldwell, III, entered partial summary judgment in favor of Wilcox and permanently enjoined the Watsons from going onto Wilcox's land, which included the old farm road.

Based on the results of the Wilcox suit, plaintiffs Kenneth and Martha Watson filed the instant case against defendants Griffin and law firm for damages suffered due to plaintiffs' lack of access to the property. Plaintiffs in the case *sub judice* included claims for: (1) fraudulent misrepresentation, intentional misrepresentation, negligent misrepresentation, and breach of fiduciary duty against Griffin; (2) negligence against the law firm; and (3) negligent infliction of emotional distress against both named defendants. On 19 August 1996, the Honorable Claude S. Sitton granted both defendants' motions for directed verdicts. In addition, the trial court's judgment recites that "the Court is entering this Declaratory Judgment" as to Wilcox's interests even though she was not a party. The trial court then determined that an easement existed across the property of Wilcox from a public road to plaintiffs' property. Further, the trial judge found that the previous two judgments mentioned above were in error, and that plaintiffs had a right to cross the existing farm road without violating the injunction. Shortly after the trial court's judgment was served on Wilcox's attorney and posted on Wilcox's home,

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Wilcox moved to set aside the judgment under N.C. Gen. Stat. § 1A-1, Rule 60 (1990). The trial court denied Wilcox's motion. Wilcox appeals the denial of the motion.

[1] The issue presented on this appeal is whether the trial court erred in failing to set aside the 19 August 1996 judgment under N.C. Gen. Stat. § 1A-1, Rule 60 as to Emma Wilcox, who was not a party to the suit. Wilcox contends that the judgment shows on its face that the trial judge: (1) overruled another superior court judge or judges; and (2) determined the property rights of a non-party without jurisdiction and without notice or opportunity to be heard.

N.C. Gen. Stat. § 1A-1, Rule 60 provides, among other things, that the court may relieve a *party* from a final judgment, order, or proceeding if the judgment is void or for any other reason justifying relief from the operation of the judgment. In *Lawyers Title Ins. Corp. v. Langdon*, 91 N.C. App. 382, 385, 371 S.E.2d 727, 730 (1988), *cert. denied*, 324 N.C. 335, 378 S.E.2d 793 (1989), this Court held that N.C. Gen. Stat. § 1A-1, Rule 60 does not apply to a non-party. In addition, we held that the only manner in which a non-party to an action may seek relief from an underlying judgment affecting the non-party's rights or property is to file an independent action to attack the judgment. *Id.*

Also in *Helbein v. Southern Metals Co.*, 119 N.C. App. 431, 458 S.E.2d 518 (1995), an appeal by a party plaintiff and a non-party under N.C. Gen. Stat. § 1A-1, Rule 60, we held the requirements of Rule 60 were satisfied since a party to the action filed the motion. *Id.* at 433, 458 S.E.2d at 519. Thus, *Helbein* and *Langdon* both hold that only a party to an action can seek relief under N.C. Gen. Stat. § 1A-1, Rule 60. In the case at bar, it appears from the face of the judgment that the trial court determined the rights of a non-party who was not before the court. Because we do not have a party to the action filing the Rule 60 motion, Rule 60 relief could not be granted.

[2] Furthermore, our Supreme Court has held that "[o]ne who is not a party to an action or who is not privy to the record is not entitled to appeal from the judgment of a lower court." *In re Brownlee*, 301 N.C. 532, 546, 272 S.E.2d 861, 869 (1981) (citing *Siler v. Blake*, 20 N.C. 90 (1838)). Thus, Wilcox, as a non-party, cannot appeal the decision of the trial court.

However, "collateral attack in an independent or subsequent action is a permissible means of seeking relief from a judgment or

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order which is void on its face for lack of jurisdiction" *In re Wheeler*, 87 N.C. App. 189, 193-94, 360 S.E.2d 458, 461 (1987) (citing *Stroupe v. Stroupe*, 301 N.C. 656, 662, 273 S.E.2d 434, 438 (1981)). Wilcox's remedy is to file an independent action to set aside this judgment. *Langdon*, 91 N.C. App. at 385, 371 S.E.2d at 730.

Though we need not specifically address or decide Wilcox's assignments of error, we observe that by determining the property rights of a non-party, the trial court may have exceeded its jurisdiction. Our Supreme Court has noted that, "[i]f there be a defect, e.g., a total want of jurisdiction apparent upon the face of the proceedings, the court will of its own motion, "stay, quash, or dismiss" the suit.'" *Stroupe*, 301 N.C. at 661, 273 S.E.2d at 438 (quoting *Branch v. Houston*, 44 N.C. 85, 88 (1852)). If the trial court was "utterly without jurisdiction to proceed" with respect to Wilcox, the 19 August 1996 judgment is void as to her. *See id.*

In conclusion, this appeal is dismissed because N.C. Gen. Stat. § 1A-1, Rule 60 relief is not available to a non-party and Wilcox as a non-party is not permitted to appeal the trial court's ruling. Wilcox must file an independent action to obtain relief.

Appeal dismissed.

Judge WYNN concurs.

Judge WALKER concurring by separate opinion.

Judge WALKER concurring.

I concur with the ultimate decision in this case; however, I believe Ms. Wilcox may proceed to intervene in this matter pursuant to Rule 24 of the N.C. Rules of Civil Procedure which provides, in pertinent part:

(a) *Intervention of right.*—Upon timely application anyone shall be permitted to intervene in an action:

. . .

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to

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protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) (1990).

In interpreting this rule, our Court, in *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 330 S.E.2d 645 (1985), stated that:

As a general rule, . . . motions to intervene made after judgment has been rendered are disfavored and are granted only after a finding of extraordinary and unusual circumstances or upon a strong showing of entitlement and justification.

Id. at 264, 330 S.E.2d at 648.

Here, since Ms. Wilcox's property interests have been affected by the trial court's judgment, this is an "extraordinary and unusual circumstance," and she should be permitted to intervene in order to have standing as a party to file a Rule 60(b) motion seeking relief from the judgment.

PATRICIA ANNETTE BURCHETTE AND SALLY BURCHETTE PLAINTIFFS V.
CHARLES WILLIAM LYNCH, DEFENDANT

No. COA97-143

(Filed 2 December 1997)

Appeal and Error § 87 (NCI4th)— deadlock on negligence issue—finding of no contributory negligence—no right of immediate appeal

Where the jury deadlocked on the issue of defendant's negligence and unanimously found plaintiff not contributorily negligent, and the trial court entered judgment on the verdict that plaintiff was not contributorily negligent and ordered a mistrial as to the negligence issue, the judgment entered on the verdict was interlocutory, and defendant had no right of immediate appeal from the judgment since defendant was not deprived of a substantial right without immediate appellate review because either verdict the jury agrees upon in the second trial on the negligence issue will not be inconsistent with the finding in the first trial that plaintiff was not contributorily negligent.

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[128 N.C. App. 65 (1997)]

Appeal by defendant from judgment entered 5 July 1996 and order entered 20 August 1996 by Judge Robert H. Hobgood in Warren County Superior Court. Heard in the Court of Appeals 21 October 1997.

Douglas T. Simons for plaintiff appellee Patricia Annette Burchette.

Jones-Smith & Smith, by Troy A. Smith, for plaintiff appellee Sally Burchette.

Cranfill, Sumner & Hartzog, L.L.P., by Emerson M. Thompson, III, for defendant appellant.

SMITH, Judge.

Plaintiff Patricia Burchette testified she was traveling north in her vehicle on Rural Paved Highway 1229 in Warren County on 2 November 1991 accompanied by her two children and her mother, plaintiff Sally Burchette. As Patricia Burchette rounded a curve in the road, she was blinded for approximately two to three seconds by the headlights of an oncoming vehicle in the southbound lane. Upon being blinded, she proceeded to brake and slow her vehicle. Her vehicle then struck a grain drill owned by defendant which was stopped in the northbound lane. Patricia Burchette testified that she did not see anything before her vehicle collided with defendant's equipment. Sally Burchette testified that all she could remember was a bright light coming over the hill. The next thing she knew, they had collided with defendant's equipment.

Defendant testified that, at approximately 5:30 p.m. on 2 November 1991, he was operating his farm tractor, which was pulling a grain drill, on a two-lane road in Warren County. He had turned the tractor from his farmland onto the road to return home for the evening. Soon thereafter, the tractor's circuit breaker went dead without warning and the tractor shut down. Defendant got off the tractor in order to make a phone call or direct traffic around the tractor. He tried to stop a vehicle in the southbound lane but the vehicle did not stop. He then attempted to stop plaintiff Patricia Burchette, who was traveling in the northbound lane; however, she did not see him and her vehicle collided with his equipment.

Plaintiffs Patricia and Sally Burchette filed this action on 18 October 1994 alleging they were injured as a result of defendant's negligence. Defendant answered denying negligence and asserting

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Patricia Burchette's contributory negligence. He also filed a counter-claim for damage to his farm equipment. The action was tried before a jury on 27 May 1996 after defendant's motion for summary judgment was denied. Defendant moved for directed verdict at the close of plaintiffs' evidence and at the close of all evidence, and these motions were also denied. On 31 May 1996, the jury deadlocked on the first issue of defendant's negligence; however, the jury unanimously found Patricia Burchette not contributorily negligent. The trial court entered judgment on the verdict that Patricia Burchette was not contributorily negligent and ordered a mistrial as to the first issue. Defendant thereafter filed a motion for judgment notwithstanding the verdict and a motion for a new trial, which the trial court denied.

On appeal, defendant argues the evidence presented by plaintiffs failed to establish his negligence, and in the alternative, that the evidence was sufficient to establish plaintiff Patricia Burchette's contributory negligence. However, we need not address these arguments, as defendant's appeal is interlocutory, and we dismiss his appeal. "If an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." *Tinch v. Video Industrial Services*, 124 N.C. App. 391, 393-94, 477 S.E.2d 193, 196 (1996) (citations omitted), *disc. review denied, cert. denied, and disc. review allowed*, 345 N.C. 646, 483 S.E.2d 718 (1997).

"An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). Here, the jury deadlocked on issue number one regarding defendant's negligence, but proceeded to answer issue number two, finding plaintiff Patricia Burchette not contributorily negligent. Because the issues of whether defendant negligently injured plaintiffs and what damages, if any, plaintiffs are entitled to recover were not answered by the jury, the judgment entered on the verdict is interlocutory since it "leaves further action by the trial court and does not dispose of the case in its entirety." *Tinch*, 124 N.C. App. at 393, 477 S.E.2d at 196.

Generally there is no right of immediate appeal from an interlocutory order. *Id.* at 393, 477 S.E.2d at 195. The purpose of this rule is "to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts." *Id.* at 393, 477 S.E.2d at 196

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(citations omitted). There are, however, two avenues by which a party can immediately appeal an interlocutory order or judgment. First, a party may immediately appeal an interlocutory order or judgment if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies there is no just reason to delay the appeal. N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990). Second, a party may immediately appeal an interlocutory order or judgment under N.C. Gen. Stat. §§ 1-277(a) (1996) and 7A-27(d)(1) (1995), "if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *Page*, 119 N.C. App. at 734, 460 S.E.2d at 334. In the instant case, the trial court did not certify that there was no just reason to delay the appeal. Thus, the only method by which defendant could immediately appeal the trial court's judgment and order is by showing that without immediate appellate review he would be deprived of a substantial right.

Courts in this jurisdiction have frequently observed that the substantial right test is more easily stated than applied. *Liggett Group v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 677 (1993). It is usually necessary to consider the facts and procedural context of each case in determining whether a substantial right is affected. *Id.* However, a substantial right is considered affected if " 'there are overlapping factual issues between the claim determined and any claims which have not yet been determined' because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues." *Id.* (citations omitted). To demonstrate that a substantial right has been affected, a party must show "(1) the same factual issues would be present in both trials **and** (2) the possibility of inconsistent verdicts on those issues exists." *Page*, 119 N.C. App. at 736, 460 S.E.2d at 335 (emphasis added).

Here, defendant has not shown he would be deprived of a substantial right without immediate appellate review of the trial court's judgment and order. While a new trial on the question of defendant's negligence would present the same factual issues as were considered at the first trial, a new trial would not pose a threat of inconsistent verdicts. At a new trial, the only liability issue the jury would be faced with is whether or not defendant was negligent on the day of the accident, a question the jury failed to answer at the first trial. Either verdict the jury agrees upon in a second trial on this issue will not be inconsistent with the finding in the first trial that plaintiff Patricia Burchette was not contributorily negligent. See *Enns v. Zayre Corp.*, 116 N.C. App. 687, 693, 449 S.E.2d 478, 482 (1994), *aff'd*, 342 N.C. 406,

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464 S.E.2d 298 (1995) ("whether plaintiff was found contributorily negligent or not . . . there is no impact on the jury's decision concerning defendant's negligence.") Thus, no substantial right of defendant would be prejudiced absent immediate appellate review of the trial court's judgment and order. For the sake of efficiency, defendant should have waited until a final determination as to his negligence was made before filing an appeal with this Court.

We are mindful of this Court's decision in *Sanders v. Yancey Trucking Co.; Johnson v. Yancey Trucking Co.*, 62 N.C. App. 602, 606, 303 S.E.2d 600, 602, *disc. review denied*, 309 N.C. 462, 307 S.E.2d 366 (1983), holding a trial court's judgment immediately appealable though a mistrial was declared on the issue of one defendant's negligence. In that case, plaintiffs were passengers in a pickup truck that collided with a dump truck. *Id.* at 603-04, 303 S.E.2d at 601. Plaintiffs filed suit against the estate of John Gulley, the driver and owner of the pickup; Lois Gulley, John Gulley's widow; George A. Yancey Trucking Company, the owner of the dump truck; and Ivey Riggs, the driver of the dump truck. *Id.* at 604, 303 S.E.2d at 601. The trial court submitted two issues to the jury: (1) whether Riggs was negligent, and (2) whether John Gulley was negligent. *Id.* The jury found John Gulley was not negligent, but was unable to reach a verdict as to Riggs' negligence. *Id.* The trial court then declared a mistrial on the issue of Riggs' negligence and ordered a new trial on that issue. *Id.* In holding the judgment was immediately reviewable on appeal, we noted substantial rights of both Riggs and the trucking company had been affected since the verdict absolved John Gulley of any negligence. *Id.* at 606, 303 S.E.2d at 602. The verdict had the effect of determining Riggs' and the trucking company's indemnity and contribution claims against Gulley's estate, in addition to determining Riggs' claim for personal injuries against the estate. *Id.*

We do not believe *Sanders* controls the outcome of the instant case. In *Sanders*, a final judgment had been entered on the issue of one **defendant's** negligence where the liability of other defendants remained unresolved. In the instant case, there is only one defendant. While a determination was made as to **plaintiff** Patricia Burchette's contributory negligence, no determination has been made as to defendant's liability. For this reason, we conclude *Sanders* is inapplicable to the present case.

Because there is no final judgment in this case, and the purported appeal is interlocutory, the appeal is dismissed.

IN THE COURT OF APPEALS

CUNNINGHAM v. CATAWBA COUNTY

[128 N.C. App. 70 (1997)]

Appeal dismissed.

Judges WYNN and WALKER concur.

SANDRA J. CUNNINGHAM, PETITIONER v. CATAWBA COUNTY, RESPONDENT

SANDRA J. CUNNINGHAM, PETITIONER v. BOBBY K. BOYD, DIRECTOR OF CATAWBA COUNTY DEPARTMENT OF SOCIAL SERVICE AND CATAWBA COUNTY, RESPONDENTS

No. COA97-23

(Filed 2 December 1997)

Administrative Law and Procedure § 44 (NCI4th); Public Officers and Employees § 63 (NCI4th)— county DSS—refusal to adopt SPC decision—statement of reasons—service on employee

A county DSS, a local appointing authority within the meaning of N.C.G.S. § 126-37 (1993), was required to state the specific reasons why it did not adopt the recommended decision of the State Personnel Commission to reinstate petitioner and to serve a copy of its final decision on the petitioner; however, the DSS was not obligated to comply with N.C.G.S. § 150B-36(b) so that it was not required to enter findings of fact and conclusions of law.

Appeal by petitioner from judgment and order filed 30 September 1996 and from order filed 16 October 1996 by Judge Robert D. Lewis in Catawba County Superior Court. Heard in the Court of Appeals 22 October 1997.

The Long Law Firm, by Samuel H. Long, III, for petitioner appellant.

Sigmon, Sigmon and Eisenhower, by W. Gene Sigmon, for respondents appellees.

GREENE, Judge.

Sandra Cunningham (petitioner) appeals from a judgment and order of the Catawba County Superior Court (trial court) which rein-

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stated her as an employee of the defendant, Catawba County (County), but reduced her award for attorney fees to \$6,430.00 and denied her request for back pay.

The facts reveal that on 2 July 1993, petitioner was dismissed from her job as a social worker with the Catawba County Department of Social Services (DSS) (an agency of the County) for "falsifying job information through misrepresentation of [her] credentials." County manager, J. Thomas Lundy, ultimately upheld petitioner's dismissal after she appealed it in accordance with section 16-112 of the Catawba County Personnel Code. Petitioner then requested a contested case hearing with the North Carolina Office of Administrative Hearings pursuant to Chapters 126 and 150B of the North Carolina General Statutes.

The State Personnel Commission (Commission), relying on evidence presented before an Administrative Law Judge (ALJ), issued its "Recommendation" in two parts. The first "Recommendation," dated 27 September 1994, recommended that petitioner be reinstated to her former position or similar one, be awarded back pay and applicable benefits, and be awarded reasonable attorney fees. The second "Recommendation," dated 31 March 1995, recommended that the County pay petitioner's attorney fees in the amount of \$11,399.00. The County responded to the "Recommendations" in a letter dated 3 May 1995 that it "[would] not follow the recommendations" of the Commission. This letter made no findings of fact or conclusions of law, did not specify the reasons for rejecting the Commission's recommended decision, and was not served upon the petitioner. The petitioner then filed a petition in superior court to enforce the decision of the Commission.

The trial court focused "its review on the final decision of the [County] in accordance with G.S. 150B-51." The trial court then reviewed the evidence presented to the ALJ and found that the decision by the County to dismiss the petitioner was "unsupported by substantial evidence." The trial court further found that because the record did not contain any evidence "with regard to [the petitioner's] post discharge earnings" it was without authority to order an award of back pay. Finally, the trial court found that the petitioner was entitled to an award of attorney fees only "for the contested case proceedings before the [ALJ], the . . . Commission, and appeal to the Superior Court . . .".

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The dispositive issue is whether a “local appointing authority,” within the meaning of N.C. Gen. Stat. § 126-37, is required to render its decision in accordance with N.C. Gen. Stat. § 150B-36(b).

Employees of a “local appointing authority,” here DSS, are subject to the provisions of the State Personnel System, as are state employees. N.C.G.S. § 126-5(a)(2) (1995) (listing non state employees subject to Chapter 126); N.C.G.S. § 126-37(a) (1993). As such, DSS employees “may commence a contested case under [Chapter 150B, Article 3]” N.C.G.S. § 150B-23(a) (1995); N.C.G.S. § 126-37(a) (1993). The Commission, after a hearing before an ALJ, “shall make a final decision in these cases as provided in G.S. 150B-36.” N.C.G.S. § 126-37(a) (1993). Except when the Commission “finds that the employee has been subjected to discrimination . . . [,] the decisions of the . . . Commission shall be advisory to the local appointing authority.” *Id.* An employee “dissatisfied with . . . the action taken by the local appointing authority pursuant to the decision [of the Commission] shall be heard [by the superior court] upon the record and not as a trial de novo.” N.C.G.S. § 126-37(b) (1993). Although “local appointing authorit[ies]” are not agencies within the meaning of the Administrative Procedure Act (Act), *see* N.C.G.S. § 150B-2(1) (1995), “the principles embodied in the Act ‘are highly pertinent’ to” review by the superior court, *Vulcan Materials Co. v. Guilford County Bd. of Comrs.*, 115 N.C. App. 319, 322, 444 S.E.2d 639, 642, *disc. review denied*, 337 N.C. 807, 449 S.E.2d 758-59 (1994) (quoting *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 625, 265 S.E.2d 379, 382 (1980)), *rehearing denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). Thus, the superior court reviewing a decision by a “local appointing authority,” within the context of a Chapter 126 proceeding, “must determine if the decision is affected by any error of law; made upon unlawful procedure; comports with due process; is supported by competent, material, and substantial evidence in the whole record; or is arbitrary and capricious.” *Vulcan Materials*, 115 N.C. at 322, 444 S.E.2d at 642;¹ *see Gray v. Orange County Health Dept.*, 119 N.C. App. 62, 73, 457 S.E.2d 892, 900 (1995) (applying Chapter 150B to review of decision of local health department),² *disc. review denied*, 341 N.C. 649, 462 S.E.2d 511 (1995).

1. Of course the court’s scope of review will be further limited by the errors assigned by the appellant. *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 21, 273 S.E.2d 232, 236 (1981).

2. We note that the legislature amended section 126-37 to specifically provide that decisions of “local appointing authorit[ies]” are “subject to judicial review pursuant to Article 4 of Chapter 150B of the General Statutes.” N.C.G.S. § 126-37(b2)

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The petitioner argues that DSS, as the “local appointing authority,” was bound to make its final decision “in accordance with G.S. 150B-36” and that failure to do so requires that the decision of the Commission be adopted as the final decision of DSS.

There is no dispute that the final decision of DSS did not comply with the requirements of section 150B-36(b) in that it: (1) did not include any findings of fact; (2) did not include any conclusions of law; (3) did not state specific reasons why DSS refused to adopt the decision of the Commission; and (4) was not personally served upon the petitioner or delivered to her by certified mail. N.C.G.S. § 150B-36(b) (1995). Is the “local appointing authority” required to follow section 150B-36? Section 126-37, as it existed on the date this action was filed, is silent on that question. It can be argued that because section 126-37 does not specifically require compliance with section 150B-36(b), compliance is not required. It can be argued, however, that because judicial review of the “local appointing authority['s]” final decision is to be conducted consistent with the principles of the Act, that decision must be entered consistent with the Act, including section 150B-36. *See Gray*, 119 N.C. App. at 72, 457 S.E.2d at 899 (1992 local health department decision rejecting recommendations of Commission included specific reasons explaining why it refused to adopt recommendations). This ambiguity must be resolved by determining the intent of the legislature. In determining that intent, it is proper to review any amendments to the statute that may reveal or address the ambiguity. *Al Smith Buick Co. v. Mazda Motor of America*, 122 N.C. App. 429, 435, 470 S.E.2d 552, 555 (1996), *disc. review denied*, 343 N.C. 749, 473 S.E.2d 609-10 (1996).

In 1994, our legislature amended section 126-37 to provide in pertinent part that if the “local appointing authority” rejects or modifies the recommended decision of the Commission, it “must state the specific reasons why it did not adopt the [recommended] decision . . . [and must serve a copy of the final decision] on each party personally or by certified mail and on each party’s attorney of record.” N.C.G.S. § 126-37(b1) (1995). We believe that this amendment reflects the intent of the legislature in enacting the original version of section 126-37 and was an effort by the legislature to clarify its original language. We thus construe the pre amended version consistent with the 1994 amendment and hold that DSS was required, in rejecting the recommended decision of the Commission, to state the specific rea-

(1995). This amendment did not become effective until 1 January 1995 and thus does not control this case.

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sons why it did not adopt the recommended decision and serve a copy of its final decision on the petitioner. Because the legislature did not specifically require that the "local appointing authority" comply with section 150B-36(b), there is no obligation to enter findings of fact and conclusions of law, as required by section 150B-36(b).

We reject, however, the suggestion of the petitioner that DSS's failure to comply with section 126-37, as we now construe it, requires that the recommended decision of the Commission become the final decision of this case. See N.C.G.S. § 150B-44 (1995). Because of the ambiguity of section 126-37 existing at the time DSS rejected the recommendations of the Commission, it should not be penalized for its failure to comply with the statute as we now construe it. We accordingly vacate the judgment and order of the trial court and remand this case to the trial court for remand to DSS for the entry of a final decision. Should the final decision be a rejection of the recommendations of the Commission, that decision should include "specific reasons why it [does] not adopt" the recommendations. Furthermore, a copy of the final decision of DSS must be served on each party. Should the final decision of DSS be adverse to the petitioner, she has the right to seek judicial review of that decision in the superior courts. Because of our resolution of this issue, it is not necessary that this Court address the other assignments of error raised by the petitioner.

Vacated and remanded.

Judges JOHN and TIMMONS-GOODSON concur.

STATE FARM LIFE INSURANCE CO., PLAINTIFF V. ANDREA LYNN ALLISON, MICHAEL P. ALLISON, JUDY WINKLER (ALLEN), TRUSTEE FOR MICHAEL P. ALLISON, JR. AND HEATH GABRIEL ALLISON, & RICH & THOMPSON FUNERAL SERVICE, INC., DEFENDANTS

No. COA97-353

(Filed 2 December 1997)

Trial § 87 (NCI4th)— husband slain by wife—self-defense claimed—insurance proceeds—summary judgment—interested party—credibility

Summary judgment for defendant Andrea Allison was inappropriate where Ms. Allison's husband died from a knife wound

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suffered in a fight with Ms. Allison, a grand jury returned “no true bill of indictment” on the charge of murder, and Mr. Allison’s life insurer filed this action to determine who was rightfully entitled to the proceeds. Although Ms. Allison claims that she is not barred from receiving proceeds because she was not convicted of a criminal offense, she is interested in the outcome of the case and the facts surrounding the death of Mr. Allison are peculiarly within her knowledge. Summary judgment should ordinarily be denied where matters of the credibility and weight of the evidence exist.

Appeal by defendants Michael P. Allison, Jr., and Heath Gabriel Allison from summary judgment entered 10 January 1997 by Judge W. Osmond Smith, III, in Alamance County Superior Court. Heard in the Court of Appeals 30 October 1997.

George B. Daniel, P.A., by George B. Daniel, for Andrea Lynn Allison, defendant appellee.

David J.P. Barber for Michael P. Allison Jr., and Heath G. Allison, defendant appellants.

SMITH, Judge.

On 15 June 1992, State Farm Life Insurance Company (“State Farm”) issued a life insurance policy for Michael P. Allison, Sr. (“Mr. Allison”), for \$50,000.00. Defendant Andrea Lynn Allison (“appellee”), Mr. Allison’s second wife, was named the primary beneficiary of the policy. Mr. Allison’s two minor sons from a previous marriage, Michael P. Allison, Jr., and Heath G. Allison (“appellants”), along with trustee Judy Winkler Allen, were named as successor beneficiaries.

On 26 December 1993, Mr. Allison and appellee returned home from a local night spot. Later that evening, they fought and appellee stabbed Mr. Allison in the chest. Mr. Allison died from the knife wound. In April 1994, an Alamance County Grand Jury returned a “no true bill of indictment” on the charge of murder against appellee Andrea Lynn Allison.

Plaintiff State Farm filed this action against all interested parties so that the court could determine who was rightfully entitled to the life insurance proceeds. Plaintiff was dismissed as a party to this action and the policy proceeds of \$51,312.46 were paid to the Alamance County Clerk’s Office pending resolution of this action.

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On 10 January 1997, Judge W. Osmond Smith, III, granted appellee Andrea Lynn Allison's motion for summary judgment as a matter of law, dismissed with prejudice plaintiff's complaint, and dismissed with prejudice appellants' counterclaim. Appellants Michael and Heath Allison appeal from the grant of the summary judgment motion.

The only issue presented for appeal is whether the trial court committed reversible error in granting the motion for summary judgment in favor of appellee. Appellate review of the grant of summary judgment is limited to two questions including: (1) whether there is a genuine question of material fact, and (2) whether the moving party is entitled to judgment as a matter of law. *Gregorino v. Charlotte-Mecklenburg Hosp. Authority*, 121 N.C. App. 593, 595, 468 S.E.2d 432, 433 (1996). A motion for summary judgment should be granted if, and only if, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). Evidence is viewed in the light most favorable to the non-moving party with all reasonable inferences drawn in favor of the nonmovant. *Whitley v. Cubberly*, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974).

Appellants argue there is a genuine issue of material fact as to whether Andrea Lynn Allison's act of stabbing her husband to death amounted to self-defense. In North Carolina, a person can be barred from receiving life insurance proceeds by: (1) N.C. Gen. Stat. § 31A-3 (the slayer statute) because that person is convicted of killing the insured; or (2) the common law rule that no one may profit from their own wrongdoing. See *Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 56-57, 213 S.E.2d 563, 569 (1975).

Appellee claims that she is not barred from receiving the life insurance proceeds under either theory, because she was not convicted of a criminal offense, and that she acted in self-defense. However, appellants claim that lack of a criminal conviction is not a bar to a civil claim because the burden of proof is different in a criminal case versus a civil case.

In [a] criminal action the burden [is] on the State to prove the absence of self-defense beyond a reasonable doubt. In [a] civil action the burden [is] on the defendant to prove self-defense by the greater weight of the evidence. In no way can the State's fail-

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ure to carry its burden in the criminal case be dispositive of the defendant's burden in the civil case.

Hussey v. Cheek, 31 N.C. App. 148, 149, 228 S.E.2d 519, 520-21 (1976) (citations omitted). Thus, appellee would bear the burden of proving her self-defense claim by the greater weight of the evidence in this civil case. This proof of self-defense would include the issue of appellee's credibility.

"[W]here matters of the credibility and weight of the evidence exist, summary judgment ordinarily should be denied." *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 351, 363 S.E.2d 215, 218, *disc. review denied*, 322 N.C. 111, 367 S.E.2d 910 (1988). Summary judgment should be denied because the credibility of a witness is to be resolved by the fact finder. *Church v. Mickler*, 55 N.C. App. 724, 732, 287 S.E.2d 131, 136 (1982). "If [appellee's] interest necessarily raises a question of [her] credibility, and [her] testimony cannot, under any circumstances, be accorded credibility as a matter of law, summary judgment would be inappropriate." *Kidd v. Early*, 289 N.C. 343, 367, 222 S.E.2d 392, 408 (1976). Furthermore, a summary judgment motion should be denied if

the movant's supporting evidence is self contradictory or circumstantially suspicious or the credibility of a witness is inherently suspect either because he is interested in the outcome of the case and the facts are peculiarly within his knowledge or because he has testified as to matters of opinion involving a substantial margin for honest error

Kidd v. Early, 289 N.C. 343, 366, 222 S.E.2d 392, 408 (1976). In the instant case, appellee is interested in the outcome of the case because she stands to gain Mr. Allison's insurance proceeds. Furthermore, the facts surrounding the death of Mr. Allison are peculiarly within her knowledge since appellee and Mr. Allison were the only two people present. Therefore, because appellee is interested in the outcome of the case and the facts surrounding Mr. Allison's death are peculiarly within her knowledge, summary judgment is inappropriate.

For the foregoing reasons, the trial court's grant of the summary judgment motion is

Reversed.

Judges MARTIN, John C., and JOHN concur.

WHITEHEART v. GARRETT

[128 N.C. App. 78 (1997)]

WILLIAM WHITEHEART, D/B/A WHITEHEART OUTDOOR ADVERTISING COMPANY, PETITIONER
v. GARLAND B. GARRETT, JR., AS SECRETARY OF TRANSPORTATION OF THE STATE OF
NORTH CAROLINA, RESPONDENT

No. COA97-108

(Filed 2 December 1997)

Highways, Streets, and Roads § 31 (NCI4th)—outdoor advertising—DOT jurisdiction—measured from interstate highway ramp

The trial court did not err by determining that respondent NCDOT's method of defining interstate right-of-way based solely on dates of construction was arbitrary in an action to determine whether an outdoor advertising sign was within the required distance from an interstate highway to be within DOT's jurisdiction where the sign is not within the required distance as measured from the highway; the sign is within the jurisdictional requirement if measured from the right-of-way of the interchange ramp; DOT contends that the interchange was built as a part of the intersecting Peter's Creek Parkway project after construction of I-40 (now I-40 Business) and cannot be considered part of the interstate system; and the interchange ramp was built to manage traffic between the Parkway and the I-40 Business and should be considered part of the interstate system. Respondent's argument that the sign would be too close to an existing sign was without merit because the trial court's order explicitly states that the only contention argued by the parties was whether the sign was within the required distance of the right-of-way.

Appeal by respondent from order signed 12 December 1996 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 21 October 1997.

Wilson & Waller, P.A., by Betty S. Waller, for petitioner-appellee.

Attorney General Michael F. Easley, by Associate Attorney General Gaines M. Weaver, for respondent-appellant.

WALKER, Judge.

On 7 July 1995, petitioner Whiteheart (Whiteheart) applied for an outdoor advertising permit for a billboard owned by Whiteheart located near the intersection of Peter's Creek Parkway and I-40

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Business in Winston-Salem. A measurement was made by an employee of the North Carolina Department of Transportation (NCDOT), for the district engineer, to determine whether the sign fell within the NCDOT's jurisdiction, as the NCDOT only controls outdoor advertising within 660 feet of the nearest edge of right-of-way along the interstate system. *See* N.C. Gen. Stat. § 136-129 (1993). A measurement made from the location of Whiteheart's sign to the line showing the edge of the right-of-way of I-40 Business on the Winston-Salem Tax Map was 890 feet. Whiteheart, however, argued that the sign was within the 660 feet jurisdictional requirement if the distance was measured from the location of the sign to the right-of-way of the interchange ramp connecting Peter's Creek Parkway and I-40 Business. On the basis of the district engineer's measurement, the sign did not fall within the jurisdiction of the NCDOT outdoor advertising regulations and the permit was denied.

Whiteheart appealed to the Secretary of Transportation to reverse the decision of the district engineer. The Secretary's staff instructed the district engineer to conduct a more detailed investigation. During this investigation, it was learned that there was a pre-existing sign, located approximately 53 feet from Whiteheart's sign, which had already been granted a permit from the NCDOT. The Secretary was informed that if the Whiteheart sign was within the jurisdiction of the NCDOT, it would be illegal to grant a permit because another sign with a permit was there first, as NCDOT regulations require that permitted signs be at least 500 feet apart. *See* 19A N.C.A.C. 2E.0203 (2)(b)(i) (1993).

Both parties moved for summary judgment. Following a hearing, the trial court granted Whiteheart's motion for summary judgment.

Summary judgment is proper if there is no genuine issue as to any material facts and the moving party is entitled to a judgment as a matter of law. *Johnson v. Insurance Co.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980). Here, the parties do not argue that any question of fact exists, thus we must examine the applicable law to determine whether summary judgment in favor of Whiteheart was proper.

Respondent first argues the trial court erred in granting summary judgment for Whiteheart on the basis that respondent's method of determining the right-of-way was arbitrary and capricious.

N.C. Gen. Stat. § 136-129 (1993), "Limitations of outdoor advertising devices" provides in pertinent part:

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No outdoor advertising shall be erected or maintained within 660 feet of the nearest edge of the right-of-way of the interstate or primary highways in this State so as to be visible from the main-traveled way thereof . . . except the following . . .

Further, N.C. Gen. Stat. § 136-133 (1993) requires that in order to maintain any outdoor advertising within 660 feet of the nearest edge of the right-of-way of the primary highway as allowed under N.C. Gen. Stat. § 136-129, a permit must first be acquired.

Respondent contends the original map for the Peter's Creek Parkway project ended where it intersected with I-40 (now I-40 Business), with the interchange ramps built as a part of the Parkway project and after the construction of I-40. Therefore, respondents argue that no portion of the Parkway project, including the ramps and right-of-way adjacent to the ramps, could be considered part of the interstate system.

On the other hand, Whiteheart argues that the right-of-way of I-40 Business encompasses the interchange ramps at the junction of I-40 Business and Peter's Creek Parkway.

We do not find any authority interpreting what constitutes the "nearest edge of the right-of-way of the interstate or primary highways" under N.C. Gen. Stat. § 136-129. However, in *Abdalla v. Highway Commission*, 261 N.C. 114, 120, 134 S.E.2d 81, 85 (1964), our Supreme Court in interpreting the term "highway" in a right-of-way agreement between the parties stated:

The ramp has a specific purpose and function. It is not established for the accommodation of abutting landowners; it is for the interchange of traffic between two heavily travelled highways (one overpassing the other). It is indeed the junction or joinder of the two highways. For all practical purposes it is part of the main highway within the meaning of the word 'highway' as set out in the 'Right of Way Agreement.'

We find the reasoning of the Court in *Abdalla* to be applicable to the instant case. The interchange ramp constructed as part of the Peter's Creek Parkway project was built to manage the interchange of traffic between Peter's Creek Parkway and I-40 Business and should be considered part of I-40 Business. As such, the right-of-way adjacent to the interchange ramps is included as part of the "right-of-way of the interstate or primary highway system" as contemplated under N.C. Gen. Stat. § 136-129.

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[128 N.C. App. 81 (1997)]

It is undisputed that Whiteheart's sign is located within 660 feet of the right-of-way adjacent to the interchange ramp. Thus, the trial court did not err in determining that the respondent's method of defining interstate right-of-way based solely on the respective dates of construction to be completely arbitrary.

Respondent next argues that the trial court committed error because it did not address respondent's argument that even if Whiteheart's sign was located within 660 feet of the interstate right-of-way, Whiteheart would still be ineligible for a permit as his sign is located too close to a pre-existing permitted sign.

We find this argument to be without merit as the trial court's order explicitly states, "the only contention argued by the parties was whether the petitioner's outdoor advertising in question is within 660 feet of the nearest edge of the right of way of Business I-40 so as to invoke the control of N.C. DOT over the billboard [.]"

The order of the trial court is

Affirmed.

Judges WYNN and SMITH concur.

MARILYN JEAN BRITT, PETITIONER v. N.C. SHERIFFS' EDUCATION AND TRAINING
STANDARDS COMMISSION, RESPONDENT

No. COA96-1481

(Filed 2 December 1997)

**Sheriffs, Police, and Other Law Enforcement Officers § 31
(NCI4th)— certification of deputy—prior p.j.c.—not a
conviction**

The trial court correctly reversed the N. C. Sheriffs' Education and Training Standards Commission where plaintiff was indicted for felonious perjury for testimony in a divorce proceeding, pled no contest to the misdemeanor of obstruction of justice, the State dismissed the felony charge, the court issued a prayer for judgment continued in 1992, plaintiff was appointed a deputy sheriff in 1994, a background check subsequent to her certification revealed the no contest plea, and the Commission

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ordered the certification revoked. Although the applicable regulations provide that certification may be revoked upon conviction of a Class B misdemeanor, including entry of a plea of no contest, a conviction occurs only when there is an entry of judgment. The issuance of a prayer for judgment continued upon payment of costs does not constitute the entry of judgment.

Appeal by respondent from order filed 26 September 1996 by Judge W. Allen Cobb, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 22 October 1997.

Charles K. Medlin, Jr., for petitioner appellee.

Attorney General Michael F. Easley, by Assistant Attorney General John J. Aldridge, III, for the respondent appellant.

GREENE, Judge.

The North Carolina Sheriffs' Education and Training Standards Commission (Commission) appeals from an order of the Onslow County Superior Court (trial court) reversing the final agency decision of the Commission revoking the deputy sheriff certification for Marilyn Britt (plaintiff).

The facts reveal: In February of 1990 the plaintiff was indicted for felonious perjury based on her February 1989 testimony in a divorce proceeding. On 10 April 1992, the plaintiff pled no contest to the misdemeanor offense of obstruction of justice as part of a plea arrangement under which the State agreed to dismiss the felony charge. Judge Henry L. Stevens, III, accepted plaintiff's plea of no contest and a "prayer for judgment [was] continued upon payment of the costs."

On 5 September 1994, the plaintiff was appointed as a deputy sheriff of Onslow County. The plaintiff applied for and received certification as a deputy sheriff through the Commission effective 14 September 1994. A subsequent background check revealed the plaintiff's plea of no contest to the obstruction of justice charge. On 8 December 1994, the plaintiff was notified by the Commission that probable cause existed to revoke her certification as a deputy sheriff because of her no contest plea to the misdemeanor offense of obstruction of justice on 10 April 1992. The plaintiff requested an administrative hearing pursuant to Chapter 150B of the North Carolina General Statutes. In its final agency decision (after a recommended decision by an administrative law judge), the Commission

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ordered that the plaintiff's sheriff's certification be revoked. The plaintiff appealed that decision to the trial court and that court reversed the Commission, concluding that the issuance of a prayer for judgment continued upon the payment of the costs on the plaintiff's no contest plea was not a "conviction" within the meaning of the regulations authorizing revocation of a previously issued certification.

The dispositive issue is whether a plea of no contest and a subsequent issuance of a prayer for judgment continued upon the payment of costs is a "conviction" within the meaning of 12 NCAC 10B.0204(d)(2).

The North Carolina Administrative Code regulations governing the Commission provide that certification may be denied, suspended, or revoked if the officer has been "convicted" of a Class B misdemeanor within five years before the date of appointment. 12 NCAC 10B.0204(d)(2) (Supp. 1995). The regulations further provide that a "conviction" includes "the entry of . . . a plea of no contest, nolo contendere, or the equivalent." 12 NCAC 10B.0103(2)(c) (Supp. 1995). It thus follows, the Commission contends, that the plaintiff's no contest plea to the misdemeanor (which the parties do not dispute is a Class B misdemeanor within the meaning of 12 NCAC 10B.0103(10)(b)) constitutes a "conviction" and supports the decision of the Commission to revoke the plaintiff's certification.

We agree with the Commission that a no contest plea *can* constitute a "conviction." It does not follow, however, that every no contest plea constitutes a "conviction" within the meaning of the regulations. A "conviction" occurs, in a legal sense, only when there is a subsequent entry of a judgment. Without the entry of a judgment, there can be no "conviction." See *Barbour v. Scheidt, Comr. of Motor Vehicles*, 246 N.C. 169, 173, 97 S.E.2d 855, 858 (1957); 24 C.J.S. *Criminal Law* § 1458, 2-4 (1989). The issuance of a "prayer for judgment continued upon the payment of costs, without more, does not constitute the entry of judgment." N.C.G.S. § 15A-101(4a) (1988). It thus follows that a plea of no contest with the subsequent issuance of a prayer for judgment continued upon the payment of costs does not constitute a "conviction" within the meaning of the regulations of the Commission.

In this case the plaintiff, after pleading no contest to the misdemeanor, received a prayer for judgment continued upon payment of costs. There was thus no entry of judgment in her case and therefore

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no “conviction” to support the revocation of her certification by the Commission. The trial court accordingly correctly reversed the Commission.¹

The Commission raises several other assignments of error and we have reviewed and overrule each of them.

Affirmed.

Judges JOHN and TIMMONS-GOODSON concur.

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VALERIE L. HUNTER AND TERRY HUNTER, PLAINTIFFS v. KENNETH RAY KENNEDY, DEFENDANT AND THIRD PARTY PLAINTIFF v. HAROLD EUGENE WILKES AND ADVANCED COFFEE SYSTEMS, INC., THIRD PARTY DEFENDANTS

No. COA96-1399

(Filed 2 December 1997)

**Insurance § 908 (NCI4th)— uninsured motorist coverage—
insurer as unnamed defendant—third party complaint by
insurer**

The trial court correctly granted the third party defendants' motion to dismiss where plaintiff was involved in an automobile accident with defendant, who was driving an uninsured vehicle; plaintiff filed a complaint against defendant and plaintiff's uninsured motorist carrier filed an answer in accordance with N.C.G.S. § 20-279.21(b)(3)(a); and the insurer then filed a third party complaint asking for indemnity or contribution. The statutory language granting the uninsured carrier the right to defend the suit is clear and unambiguous and must be construed using the plain meaning of the language. Dictionaries define “defend” as contesting a claim or endeavoring to defeat a claim; filing a third party compliant is an affirmative claim and not an action taken in an effort to defeat the original claim.

1. We note that the order of the trial court does contain some language suggesting that it intends to adopt the opinion of the administrative law judge in some modified form. We have disregarded this language because it conflicts with the unambiguous language of the trial court concluding that the no contest plea could not be used by the Commission to support a revocation of the plaintiff's certification.

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Appeal by unnamed defendant Integon Indemnity Corporation from order filed 4 March 1996 by Judge E. Lynn Johnson in Wake County Superior Court. Heard in the Court of Appeals 22 October 1997.

Walter L. Horton, Jr., and David K. Williams, Jr., for unnamed defendant appellant Integon Indemnity Corporation.

Smith & Holmes, P.C., by Robert P. Holmes, for third party defendants appellees Harold Eugene Wilkes and Advanced Coffee Systems, Inc.

GREENE, Judge.

Unnamed defendant and third party plaintiff, Integon Indemnity Corporation (Integon), appeals from the trial court's order granting the third party defendants', Harold Wilkes (Wilkes) and Advanced Coffee Systems (ACS), motion to dismiss the third party complaint.

The facts are as follows: On 27 October 1988, Valerie L. Hunter (Hunter) was in a motor vehicle accident with Kenneth R. Kennedy (Kennedy) who was driving an uninsured vehicle. Hunter had uninsured motorist insurance coverage with Integon in the amount of \$100,000 per person and \$300,000 per occurrence. Hunter filed a complaint against Kennedy and Integon filed an answer to Hunter's complaint in the name of the uninsured motorist, Kennedy, in accordance with N.C. Gen. Stat. § 20-279.21(b)(3)(a). Integon was the unnamed party defendant. Integon filed a third party complaint, in the name of Kennedy, against Wilkes and ACS asking for indemnity or contribution. In the answer and the third party complaint, Integon admitted that Kennedy's automobile collided with Hunter's automobile but asserted that the collision was the result of the negligence of Wilkes, whose automobile had struck Kennedy causing him (Kennedy) to collide with Hunter.

The issue is whether an uninsured motorist carrier may, in defending an uninsured motorist pursuant to N.C. Gen. Stat. § 20-279.21(b)(3)(a), file a third party complaint seeking contribution and/or indemnification.

N.C. Gen. Stat. § 20-279.21(b)(3)(a) provides in pertinent part that:

The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and

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may defend the suit in the name of the uninsured motorist or in its own name. The insurer, upon being served with copy of summons, complaint or other pleading, shall have the time allowed by statute in which to answer, demur or otherwise plead . . . to the summons, complaint or other process served upon it.

N.C.G.S. § 20-279.21(b)(3)(a) (1993) (emphasis added). Integon contends that its right to “defend the suit,” within the meaning of section 20-279.21(b)(3)(a), includes the right to file a third party complaint in the name of the uninsured motorist pursuant to Rule 14 of the Rules of Civil Procedure. *See* N.C.G.S. § 1A-1, Rule 14 (1990). We disagree.

The language in section 20-279.21(b)(3)(a) granting the uninsured carrier the right to “defend the suit” in the name of the uninsured motorist or in its own name is clear and unambiguous and the courts must construe the language using its plain meaning. *See Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984). Dictionaries may be used to determine the plain or ordinary meaning of words. *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970). Dictionaries define “defend” as the contesting of a claim or endeavoring to “defeat a claim or demand made against one in a court of justice.” *Black’s Law Dictionary* 419 (6th ed. 1990); *see American Heritage Dictionary* 374 (2nd ed. 1982).

In this case the filing of a Rule 14 third party complaint by Integon in the name of the uninsured motorist¹ is an affirmative claim and not an action taken in an effort to defeat the original claim asserted by Hunter.² Accordingly, the third party complaint is not within the scope of section 20-279.21(b)(3)(a) and the trial court correctly granted the third party defendants’, Wilkes and ACS, motion to dismiss the third party complaint.³

Affirmed.

Judges JOHN and TIMMONS-GOODSON concur.

1. We note that in this record there is no evidence that the third party complaint was filed on behalf of and with the consent of Kennedy, the uninsured motorist. If such an action were filed by the uninsured motorist, it would not be governed by the limitations of section 20-279.21(b)(3)(a).

2. A defense of the suit within the meaning of section 20-279.21(b)(3)(a) permits the uninsured motorist carrier, in the name of the uninsured motorist or in its own name, to assert those defenses itemized in Rule 12 of our Rules of Civil Procedure. *See* N.C.G.S. § 1A-1, Rule 12 (1990).

3. We acknowledge that this Court in *Johnson v. Hudson*, 122 N.C. App. 188, 468 S.E.2d 64 (1996) reversed the entry of summary judgment dismissing an underinsured

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STATE OF NORTH CAROLINA v. JOHN CLARK, JR.

No. COA96-1487

(Filed 16 December 1997)

1. Criminal Law § 114 (NCI4th Rev.)— probation and parole records—order for provision to State—no statutory violation

The trial court's order that the Department of Correction provide to the State copies of defendant's probation and parole records which were provided to defendant was not made under N.C.G.S. § 15A-905(a) and thus did not violate that statute, even if there was no evidence that defendant intended to use those records at trial, because the records were not in the "possession, custody, or control of the State" within the meaning of N.C.G.S. § 15A-903(d).

2. Criminal Law § 115 (NCI4th Rev.)— psychiatric evaluations of defendant—order for provision to State—harmless error

The trial court erred by ordering defendant's psychiatric experts to prepare and deliver to the State written reports of their evaluations of defendant; however, this order did not violate defendant's constitutional rights to be free from compulsory self-incrimination and to present a defense and was not prejudicial to defendant where defendant introduced those reports into evidence at trial, and the State did not compel defendant or his experts to testify as to any matters disclosed during the course of defendant's psychiatric evaluations which defendant had not already put into evidence.

3. Constitutional Law § 352 (NCI4th); Criminal Law § 18 (NCI4th Rev.)— diminished capacity defense—order for additional mental examination—rebuttal by State

The trial court's order that defendant undergo a third psychiatric evaluation for the purpose of allowing the State to rebut defendant's diminished capacity defense based on evaluations by two defense psychiatrists did not violate defendant's right against self-incrimination and his right to present a defense.

motorist carrier's third party complaint. That case did not address the specific issue raised in this case and therefore cannot be read to hold that an uninsured motorist carrier, defending an action pursuant to section 20-279.21(b)(3)(a), has the right to file a third party complaint seeking contribution and/or indemnity.

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4. Criminal Law § 418 (NCI4th Rev.); Evidence and Witnesses § 2302 (NCI4th)— opening statements —victim's conduct—irrelevant evidence—preclusion of forecast

In a prosecution of defendant for the first-degree murder of his wife, the trial court did not err by precluding defense counsel from forecasting during his opening statements evidence that the wife had a prior criminal record, used cocaine during the marriage, had extra-marital affairs, and had a baby by another man during her marriage to defendant because such evidence was not relevant to defendant's defense of diminished capacity, to the issue of premeditation and deliberation, or to any theory of defendant's case.

5. Evidence and Witnesses § 264 (NCI4th)— aggressiveness of murder victim—irrelevancy

Evidence regarding an incident in which his wife shot defendant was irrelevant in a prosecution of defendant for the first-degree murder of his wife and her boyfriend where defendant did not claim that he acted in self-defense or that his wife was the aggressor at the time of the killings.

6. Evidence and Witnesses § 609 (NCI4th); Indigent Persons § 24 (NCI4th)— denial of funds for expert's return—not denial of surrebuttal right

The trial court did not improperly deny defendant the right to present surrebuttal evidence by the denial of defendant's request for additional funds to bring his "blood spatter" expert witness back to court to rebut testimony by the State's rebuttal expert witness where the State's witness presented no new or additional evidence regarding the State's version of the crime but merely presented a version of the facts different from that of the defense, and defendant was thus not entitled to present surrebuttal evidence. N.C.G.S. § 15A-1226.

7. Criminal Law § 467 (NCI4th Rev.)— prosecutor's closing argument—length of time to try defendant—time to think up defense—reasonable inference

The prosecutor's comments during closing argument about the length of time it took to try defendant for first-degree murder amounted to no more than an observation on the time it may have taken defendant to "think up" a defense and was a reasonable inference based on the evidence presented at trial.

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8. Criminal Law § 431 (NCI4th Rev.)— prosecutor's closing argument—speculation as to why witness didn't testify—no impropriety

The prosecutor's closing argument in a first-degree murder trial about the failure of defendant's first psychiatrist to testify, including statements that defendant may have had to get a new psychiatrist because defendant told the first psychiatrist a different version of the killings than defendant told in court, merely raised an inference as to why one of defendant's witnesses had not testified and was not improper.

Appeal by defendant from judgment entered 7 December 1995 by Judge B. Craig Ellis in Robeson County Superior Court. Heard in the Court of Appeals 21 October 1997.

*Michael F. Easley, Attorney General, by Jeffrey P. Gray,
Assistant Attorney General, for the State.*

Margaret Creasy Ciardella, attorney for defendant-appellant.

WYNN, Judge.

Having been convicted by a jury of the first-degree murder of his wife and her boyfriend, John Clark, Jr. seeks a new trial contending that the trial court committed prejudicial error by: (1) granting the State's request that it be given copies of his parole and probation records; (2) ordering his psychiatric experts to prepare and deliver reports of his mental condition to the State prior to trial; (3) ordering him to undergo a mental examination; (4) ruling at trial that certain evidence regarding the conduct of the victims be excluded; (5) not allowing him to present surrebuttal evidence at trial in response to certain evidence presented by the State; and (6) overruling his objection to certain statements made by the State during its closing arguments. Because we find no prejudicial error in any of the trial court's rulings, we hold that Clark received a fair trial, free from prejudicial error.

The evidence at trial tended to show that: On September 25, 1992, the bodies of Clark's wife, Linda, and Garland Brooks were found in the marital home trailer of defendant Clark and Linda. At the time of the homicides, Clark had been separated from Linda for less than a week under a domestic violence protective order obtained by Linda.

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The investigators found Brooks' body in the living room and evidence that he had been consuming beer. They found Linda's body partially nude in the bathroom. At the time of the murders, the couple's three minor children were in one of the back bedrooms of the trailer. A few hours after the killings, Clark surrendered to a sheriff's detective, admitted to committing the killings and signed a written confession.

In his statement, Clark stated that he had driven past his trailer, saw a van parked in the yard, parked his truck a short distance away, got a shotgun from his truck and then walked back to the trailer. He then entered the back door of the trailer and saw Brooks sitting in the living room drinking a beer and watching television. He shot Brooks and then heard his wife scream from the bathroom. He then broke the bathroom door down and shot his wife repeatedly. Thereafter, he left the trailer with his three children. His shotgun was found about sixty feet from the back corner of the trailer.

In addition to Clark's statement, the evidence showed an extensive history of violence with his wife—including Clark's conviction for assaulting and kidnaping his wife, and his wife's conviction for assaulting him with a deadly weapon. Other evidence tended to show that his wife had a history of drug usage and sexual infidelity during the couple's ten year marriage.

After being indicted for two counts of first-degree murder, Clark was tried capitally under the theories of felony murder, and premeditation and deliberation beginning at the 25 September session of the Robeson County Superior Court. The jury found him guilty of first-degree murder under the theory of premeditation and deliberation. Following a capital sentencing hearing, the trial judge sentenced him two consecutive terms of life imprisonment. This appeal followed.

I.

[1] Clark first contends that the trial court committed prejudicial error by granting the State's request to obtain copies of his parole and probation records from the North Carolina Department of Corrections. He argues that the trial court's ruling violated N.C. Gen. Stat. § 15A-905(a), which provides for the disclosure of evidence by a defendant to the State, and that as a result of that ruling, his constitutional right not to testify against himself under both the state and federal constitutions was violated. We disagree.

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N.C. Gen. Stat. § 15A-905(a) provides that if a defendant is granted any of the evidentiary matters set forth in § 15A-903(d), then upon motion by the State, the trial court must order that similar documentary evidence which “the defendant intends to introduce in evidence at trial” be furnished to the State for its inspection. Under N.C. Gen. Stat. § 15A-903(d), upon motion by defendant, a trial court must order the State to furnish to the defendant any documents or tangible objects “within the possession, custody, or control of the State,” which are material to the preparation of his defense and which are intended to be used by the State as evidence at trial.

Citing to our Supreme Court’s holding in *State v. White*, 331 N.C. 604, 419 S.E.2d 551 (1992) and this Court’s holding in *State v. King*, 75 N.C. App. 618, 331 S.E.2d 291, *dis. rev. denied*, 314 N.C. 545, 335 S.E.2d 24 (1985) Clark argues that the trial court had no authority under N.C.G.S. § 15A-905(a) to order the disclosure of the Department of Corrections records because there was no evidence at the time the court entered its order that he *intended* to use those records at trial.

In this case, however, the trial court’s order requiring that the defendant’s probation and parole records be furnished to the State was not made under N.C.G.S. § 15A-905(a) because the records were in the control of the Department of Corrections and not in the “possession, custody, or control of the State” as envisioned by N.C.G.S. § 15A-903(d).

In *State v. Crews*, 296 N.C. 607, 616, 252 S.E.2d 745, 754 (1979), our Supreme Court held that “within the possession, custody, or control of the State,” as used in N.C.G.S. § 15A-903(d), means that the documents are within the possession, custody, or control of the *prosecutor or those working in conjunction with him or his office* (emphasis added). Here, the records which were provided to both the State and the defendant were in the possession, custody and control of the Department of Corrections. During pretrial motions, Clark moved, and the court so ordered, that the Department of Corrections provide him with copies of his probation and parole records. The trial court then ordered the Department of Corrections, a state agency which was neither a party to this case nor a party working in conjunction with the State, to provide the State with the records it had furnished to Clark. Thus, the court did not order the State to provide these records under N.C.G.S. § 15A-903(d) because these records were not in the State’s “possession, custody or control.”

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Since relief granted under N.C.G.S. § 15A-903(d) is a condition precedent to the court exercising its authority under N.C.G.S. § 15A-905(a), we find that the trial court did not violate N.C.G.S. § 15A-905(a) in ordering the Department of Corrections to provide the State with the defendant's probation and parole records.

II.

[2] Next, Clark contends that the trial court committed prejudicial error in requiring that his psychiatric experts prepare and deliver to the State written reports of their evaluations of him. He argues that the trial court violated his federal and state constitutional rights to be free from compulsory self-incrimination and his right to present a defense. Although we agree that the trial court erred in ordering Clark's experts to provide the State with written evaluation reports on him, we conclude that under the facts of this case, that error was harmless.

In *State v. Bacon*, 337 N.C. 66, 446 S.E.2d 542 (1994), the trial court ordered defendant to submit written reports to the State as required by N.C.G.S. § 15A-905(b), which provides for the disclosure of reports of examinations and tests by a defendant. See N.C. Gen. Stat. § 15A-905(b) (1973). In *Bacon*, the defendant, like defendant Clark in this case, argued on appeal that his constitutional rights had been violated because the trial court improperly required, upon motion by the State, that his psychiatric expert compile and submit to the State a written report of his evaluation of defendant. In granting the State's request for the reports, the trial court in *Bacon* noted that it was required under N.C.G.S. § 15A-905(b) to order the written reports because it had previously granted the relief sought by the defendant under N.C.G.S. § 15A-903(e). *Bacon*, 337 N.C. at 84, 446 S.E.2d at 550. Based upon this rationale, our Supreme Court held that the "trial court's order provided no more than the reciprocal discovery requirements under N.C.G.S. § 15A-905(b)," and that therefore, defendant's constitutional rights had not been violated. *Id.* According to the court, the trial court was "merely address[ing] the district attorney's concern that the expert would examine the defendant and never prepare a written report, thus hindering the State's ability to cross-examine the expert." *Id.* at 85, 446 S.E.2d at 550.

The State argues that the facts in the instant case and those in *Bacon* are identical and that therefore the trial court properly relied on it to order defense experts to submit their written evaluation reports to the State. We disagree.

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Unlike the present case, in *Bacon*, the trial court granted the defendant's request under N.C.G.S. § 15A-903(e) that the State provide it with reports of the examinations and tests that the State had performed on defendant. To reciprocate that grant of relief, the trial court then ordered the defense experts, as required by it under N.C.G.S. § 15A-905(b), to provide the State with written reports of their evaluations. Achieving the reciprocity required under N.C.G.S. § 15A-905(b) was therefore, an essential basis in *Bacon* for both the trial court's ruling and our Supreme Court's decision to uphold that ruling on appeal.

In contrast, in the instant case, defendant Clark did not request that the state provide him with psychiatric tests or reports evaluating him. Thus, the reciprocation under *Bacon* is not present in this case. We, therefore, conclude that the holding in *Bacon* is inapplicable under the facts of this case. Accordingly, we find that the trial court erred by ordering defendant's experts to provide written reports of tests performed on the defendant to the State.

However, we conclude that the error committed by the trial court was not prejudicial to defendant's case. See *State v. Paul*, 58 N.C. App. 723, 294 S.E.2d 762, cert. denied, 307 N.C. 128, 297 S.E.2d 402 (1982); *Yost v. Hall*, 233 N.C. 463, 64 S.E.2d 554 (1991) (holding that a defendant is entitled to a new trial only if the impropriety is shown to be prejudicial).

In identifying the specific constitutional injury suffered by him, Clark argues that his constitutional right to be free from compulsory self-incrimination, and his right to present a defense were violated by the court's error because, he argues, information gathered by an examining psychiatrist may include not only defendant's "dreams, fantasies, sins, and his shame," but may also expose defendant's role in potentially incriminating events.

Where, as here, Clark actually introduced into evidence at trial the same reports that he was required to provide to the State, we are not persuaded by Clark's argument that the disclosure of information contained in those reports prejudiced his rights to a fair trial. In fact, we can find no instance in the record in which the State compelled defendant or his experts to testify as to matters disclosed during the course of defendant's psychiatric evaluations which Clark himself had not already put into evidence. In short, nothing in the record indicates that the trial court's order in any way prejudiced Clark's case. Accordingly, we hold that although the trial court improperly ordered

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Clark's experts to provide the State with written reports of their evaluations of him, that order did not serve to deprive Clark of his constitutional right to be free from compulsory self-incrimination and his right to present a defense.

III.

[3] Clark next argues that the trial court committed prejudicial error in ordering him to undergo a psychiatric evaluation at the State's request, after he had already undergone two evaluations by his own psychiatrists. Although intending to offer the testimony of his psychiatrists to show his diminished capacity, Clark nonetheless contends that the trial court, in ordering him to undergo this third evaluation, violated his federal and state constitutional rights to be free from compulsory self-incrimination and his right to present a defense. We disagree.

When a defendant attempts to establish a diminished capacity defense and introduces expert testimony regarding his mental status, the State may then introduce expert testimony derived from prior court-ordered psychiatric examinations in order to rebut that testimony without implicating the fifth amendment of the U.S. Constitution or Article I, Section 23 of the North Carolina Constitution. *See State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989); *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903(1985); *Buchanan v. Kentucky*, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed.2d 336, *reh'g or modification denied*, 483 U.S. 1044. 108 S. Ct. 19, 97 L. Ed.2d. 807 (1987); *U.S. v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984). In *Huff, supra*, our Supreme Court specifically addressed the constitutional propriety of multiple psychiatric examinations when used by the State for the purpose of rebutting a defendant's assertion of the insanity defense. There, the Court held that "a fair opportunity to rebut may include more than one examination of defendant." *Huff*, 325 N.C. at 47, 381 S.E.2d at 661. In reaching this conclusion, the Court set forth what it believed were generally, "sound reasons" for examining a defendant more than once:

The conclusions of any mental health expert, his diagnoses and postdictions, are only as reliable as the data on which those conclusions are based. If there is reason to believe that defendant's evaluation was based on incomplete or distorted data, then there is good reason to reevaluate the individual in light of more complete or more accurate data. The skill of the clinician interpreting the raw data can also affect the validity of a diagnosis or other

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clinical judgment. Furthermore, retesting is often useful in defining the parameters of a mental illness. Although the underlying condition may always be present, the mental illness may over time manifest itself with symptoms of varying intensity. Knowing the parameters of the illness may increase the reliability of an expert's postdictions about a defendant's mental condition.

Id.

Although the issue in *Huff* involved the State's right to rebut a defendant's insanity defense, and in this case Clark asserted a diminished capacity defense, we nonetheless believe that the rationale set forth by the *Huff* court applies here. *Huff* implicitly empowers a trial court with the authority to require a defendant to submit to more than one mental examination for the purpose of inquiring into his mental status at the time of the alleged offense when that mental status is made an issue, in some form or another, by the defendant. Therefore, in light of the "sound reasons" made clear by the court in *Huff*, we hold that the trial court in this case committed no error in ordering Clark to undergo a third psychiatric evaluation for the purpose of allowing the State to rebut his diminished capacity defense.

IV.

[4] Clark next argues that the trial court committed prejudicial error in granting the State's request that he be precluded from offering certain evidence regarding the conduct of the victims, specifically, his wife. Again, we disagree.

Clark contends that the trial court violated the North Carolina Rules of Evidence and deprived him of his constitutional right to due process, including his right to present a defense, by precluding him from forecasting during his opening statements, evidence regarding: the prior convictions of his wife; her use of cocaine during the marriage; her affairs with other married men; the fact that she had a baby by another man; and an incident in which she shot him. By not allowing him to point out this evidence in his opening statements, Clark argues that the trial court effectively precluded him from introducing into evidence his version of the marital relationship and prejudiced his defense of diminished capacity. As it was the State who intended to present his wife as the non-violent person in the marital relationship, Clark argues that he was therefore entitled to introduce, by way of his opening statement, evidence which tended to rebut that claim.

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We would agree with Clark's assertion if the evidence which he sought to introduce regarding the marital relationship between he and his wife was both relevant to the theory of his case and of some probative value to his defense of diminished capacity. Under our rules of evidence, all proffered evidence is subject to Rule 402 and 403. Rule 402 precludes the admission of irrelevant evidence. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1992). Rule 403 provides that evidence, although relevant, may be excluded where any "probative value is substantially outweighed by unfair prejudice, confusion of the issues, or misleading of the jury." N.C. Gen. Stat. § 8C-1, Rule 403 (1992).

In this case, the evidence that Clark intended to mention during his opening statements and introduce later at trial was neither probative of whether Clark's mental status was of a diminished capacity at the time of the killings nor whether he lacked the malice, premeditation, or deliberation necessary to convict him of first-degree murder. Contrary to Clark's assertion, the fact that his wife had a prior criminal record, used drugs during the marriage, had extra-marital affairs, and had a baby by another man during her marriage to him were simply of no relevance to any theory of his case. At most, this evidence was probative of a justifiable homicide defense, which in this state is lawful only by reason of perfect self-defense or imperfect self-defense, in which case the defendant's culpability is merely reduced, not excused. *State v. Norman*, 324 N.C. 253, 266, 378 S.E.2d 8, 16 (1989). Defendant, however, makes no claim of self-defense, perfect or imperfect, and we are reluctant to conclude that such evidence is probative of his defense of diminished capacity. Indeed, we believe that if such evidence were introduced at trial, it would only serve to subtly permit the jury to view Clark's wife as the "bad person" and distract it from considering the focal issue of what actually happened on the day of the killings. See N.C. Gen. Stat. § 8C-1, Rule 404, Official Commentary quoting Fed. R. Evid. 404, Advisory Committee Note.

[5] Likewise, evidence regarding the aggressive nature of his wife was also irrelevant and of no probative value. Clark did not assert a claim of self-defense or that his wife was the aggressor at the time of the killings; therefore, the aggressiveness of his wife during the marriage was irrelevant and thereby, inadmissible. See *State v. Leazer*,

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337 N.C. 454, 458, 446 S.E.2d 54, 56-57 (1994) (holding that because there was no reliance by defendant on claim of self-defense or justifiable homicide, evidence of the victim's prior convictions for murder was properly excluded). Accordingly, we hold that the trial court did not err in precluding defense counsel from mentioning during his opening statements evidence regarding the conduct of defendant's wife during the course of the couple's marriage. We note in passing that although defendant was not permitted to mention the subject evidence during his opening statement, the gravamen of the evidence was nonetheless admitted during the course of the trial.

V.

[6] Next, Clark contends that the trial court committed prejudicial error in refusing to allow him to present surrebuttal evidence, and that this error deprived him of his constitutional right to due process, specifically his right to present a defense. We disagree.

At the outset, the State calls our attention to what it refers to as, the "misleading" nature of this assignment of error. The State points out in its brief that what actually occurred in regards to Clark's motion to present surrebuttal evidence is that Clark moved the court for additional funds so that their out-of-town expert witness could be flown back to Robeson County to rebut the State's rebuttal expert witness. Because it was that specific motion which the trial court denied, the State contends that the trial court therefore did not deny defendant the right to present evidence in surrebuttal.

However, in a criminal case such as this in which the breadth of defendant's defense is contingent upon the resources provided to it by the State, the denial of a defense attorney's request for additional funds to bring a witness back to court for further testimony is tantamount to denying the defendant the right to present rebuttal or, as in this case, surrebuttal evidence. With that in mind, we proceed to address the merits of Clark's assignment of error.

The presentation of additional evidence, rebuttal, and surrebuttal evidence in a criminal trial is governed by Subsection 1226 of Chapter 15A of North Carolina's Criminal Procedures Act. That section provides in pertinent part, that:

[e]ach party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party. The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or dur-

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ing a previous rebuttal, but if evidence is allowed, the other party must be permitted further rebuttal.

In interpreting this statute and ones similar to it in other states, our federal courts have consistently held that it is an abuse of discretion for the trial court to disallow surrebuttal evidence by the defendant when the State's rebuttal testimony presents new issues not raised in the defendant's case in chief. *United States v. King*, 879 F.2d 137 (4th Cir. 1989); see also *Merrill v. United States*, 338 F.2d 763 (5th Cir. 1964). Therefore, in determining whether a defendant is entitled to present surrebuttal evidence, the dispositive issue is whether the state presented new evidence on rebuttal.

In the instant case, Clark presented expert testimony in his case-in-chief on "blood splatter" to support his theory that at the time he shot both victims they were sitting in a recliner with his wife sitting naked on the lap of the male victim. On rebuttal, the State offered the testimony of Special Agent P.D. Weaver, an expert himself in blood-splatter evidence, in order to assert their theory that Clark's wife was in the bathroom at the time of the shootings and that the male victim was sitting on the sofa. The State contends on appeal that no new evidence was presented by Special Agent Weaver during the course of his testimony, and that therefore, Clark was not entitled to present surrebuttal evidence. With this contention, we agree.

Our review of Special Agent Weaver's testimony reveals that in giving his expert opinion, he presented to the jury no new or additional evidence regarding the State's version of the crime; instead, he merely presented a version of the facts "different" from that of the defense. Moreover, his testimony was wholly consistent with the evidence of other investigating officers presented by the State in its case-in-chief. Therefore, we hold that the trial court did not err in denying Clark's request to present surrebuttal evidence.

VI.

[7],[8] Finally, we reach Clark's assertion that he is entitled to a new trial because the trial court committed prejudicial error by overruling his objections to certain statements made by the prosecutor during his closing arguments.

In the first statement to which Clark objected, the prosecutor posed the following rhetorical question to the jury:

Why, some of you are asking, why has this taken so long? Why have we extended this thing out to two months? One of the rea-

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sons, ladies and gentlemen, or the main reason for that is the defendant.

Over the defense's objections, the prosecutor continued by stating:

[THE STATE] For almost three years he stuck with his version that he gave to the police.

[DEFENSE] Objection.

[THE STATE] And then just prior to trial—and he's testified to this—first time he's ever told this version, he comes up with this version.

[DEFENSE] Objection.

[THE COURT] Overruled.

Still even further into his closing argument, the prosecutor stated as follows:

[THE STATE] You heard testimony that Dr. Hattem didn't get involved in this case until September. That's the month we started this case, ladies and gentlemen. What happened to the psychiatrist that was involved back in 1993?

[DEFENSE] Objection, Your honor. There's been no testimony.

[THE COURT] Sustained.

[DEFENSE] And motion to strike.

[THE STATE] Dr. Hattem testified that Dr.—can't even think of his name from Winston Salem—had examined, had testified the defendant in January of 1993. Told us that. Where is he, ladies and gentlemen? Did the defendant not tell him the right thing?

[DEFENSE] Objection, Your honor.

[THE COURT] Overruled.

[THE STATE] Did the defendant tell him the story, the same story he told the police? According to the defendant, he did. Because 1995 was the first time he'd ever told this version that he told in court. And he told us that. Well, if he told the psychiatrist the wrong thing, we got to get another one. And that's exactly what they did, ladies and gentlemen. They went and got another one. The last minute. They bit the mule. Invented a new story.

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[DEFENSE] Objection to inventing a story, your honor.**[THE COURT]** Overruled.

In general, the closing arguments of counsel are left to the control and discretion of the presiding judge, and counsel is allowed wide latitude in the argument of hotly contested cases. *State v. King*, 29 N.C. 707, 264 S.E.2d 40 (1980). Thus, counsel may argue facts in evidence and all reasonable inferences arising from those facts. *State v. Miller*, 88 N.C. 52, 220 S.E.2d 326 (1975). However, counsel may not interject facts and personal beliefs not supported by the evidence, *State v. Williams*, 317 N.C. 474, 346 S.E.2d 161 (1986), or make erroneous statements of the law. *State v. Cole*, 241 N.C. 576, 86 S.E.2d 203 (1955).

Applying the foregoing principles to the challenged statements made by the prosecutor in this case, we hold that the trial court committed no error in overruling defendant's objections to those statements. We believe the statements made by the prosecutor regarding the length of the trial, when read together, amount to no more than an observation by the State of the lengthy amount of time it may have taken defendant to "think up" a defense. Based upon the facts which were placed into evidence at trial, this was a reasonable inference to be put to the jury. See *State v. Rogers*, 323 N.C. 658, 664, 374 S.E.2d 852, 856 (1989) (holding that a prosecutor's comments speculating that the defense of intoxication was an afterthought was a legitimate inference arising out of the evidence). The same is true of the statements made by the prosecutor regarding the defendant's experts. In making those particular statements, the prosecutor was merely raising an inference as to why one of the defendant's witnesses had not testified. To make such an inference is permissible. See *State v. Craig*, 308 N.C. 446, 458-59, 302 S.E.2d 740, 748 (1983) (holding that the state is allowed to draw the jury's attention to the fact that defendant failed to produce evidence which contradicted the state's case, and that it was also permissible for the state to draw the jury's attention to the failure of the defendant to produce exculpatory testimony from witnesses available to the defense). Accordingly, this assignment of error is without merit.

CONCLUSION

In the trial of John Clark, Jr., we hold that he received a fair trial, free from prejudicial error.

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No prejudicial error.

Judges WALKER and SMITH concur.

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TOWN OF ERWIN, RESPONDENT-APPELLEE

No. COA97-52

No. COA97-53

(Filed 16 December 1997)

1. Appeal and Error § 421 (NCI4th)— failure to reference transcript or record pages—violation of appellate rules—appeal heard to prevent manifest injustice

An appeal was subject to dismissal, but was heard pursuant to the discretionary authority of the court to prevent manifest injustice, where appellants failed to comply with numerous provisions of the Rules of Appellate Procedure, especially Rules 28(b)(4) and (5).

2. Municipal Corporations § 123 (NCI4th)— annexation—challenge to ordinance—petition not timely filed

The trial court did not err by dismissing for lack of jurisdiction a petition for review of an annexation ordinance where the petition was not timely filed. N.C.G.S. § 160A-38 provides that any person owning property in the annexed territory may file a petition seeking review within thirty days following passage of an annexation ordinance. The challenged ordinance was passed on 20 March 1996 and the petition was filed on 22 April 1996. Although petitioner argues that passage does not occur until the text of the ordinance can be read so that interested parties can comprehend its effect, an ordinance is passed when voted on by the governing board of the municipality. Because of the failure to timely file the petition, the trial court had no jurisdiction and properly dismissed the action.

3. Time or Date § 19 (NCI4th)— annexation ordinance—petition for review—untimely filed—no authority to extend time under Rule 6(d)

Even if petitioner could demonstrate that a petition for review of an annexation ordinance was untimely filed due to

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excusable neglect, the trial court had no authority under N.C.G.S. § 1A-1, Rule 6(b) to extend the time. It has been consistently held that a trial court's authority in exercising its discretion under Rule 6(b) is limited to those time periods prescribed by the Rules of Civil Procedure; the thirty day time limitation here is a mandate set forth by the legislature by statute which must be met in order to confer jurisdiction rather than a limitation contained in the Rules of Civil Procedure.

4. Municipal Corporations § 130 (NCI4th)— review of annexation ordinance—motion to amend petition—more than 30 days after petition—denial not an abuse of discretion

The trial court did not abuse its discretion in denying a motion to amend a petition to review an annexation ordinance where the amendment was to include review of the readoption of the ordinance after certain language was amended. A party may amend its pleading as a matter of course under N.C.G.S. § 1A-1, Rule 15(a) within thirty days and otherwise only by leave of court, which shall be freely allowed. Here, petitioner sought the amendment more than thirty days after the original petition was filed, the order denying the motion states that the interest of justice would not be served by granting the requested relief, and the transcript indicates that the motion was denied to prevent petitioner from unfairly extending the time to challenge the second ordinance after it had become apparent that the second action would likely be dismissed for failure to timely file. The trial court's decision was a reasoned one made to prevent unfair prejudice to the Town.

5. Municipal Corporations § 129 (NCI4th)— annexation—ordinance re-adopted—petition for review of original ordinance—moot

The trial court did not err by granting summary judgment for defendant on petitioner's April 1 petition on the grounds that it was moot where the Town adopted an annexation ordinance on 7 March; called a special meeting on 20 March at which it re-adopted the 7 March ordinance after removing certain language; the minutes of this meeting were not made a part of the public record until 5 April; petitioner had filed for superior court review of the 7 March ordinance on 1 April; petitioner filed a second petition on 22 April to review the second ordinance; defendant moved to dismiss this petition on the grounds that it was not timely filed;

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and petitioner filed an amended petition to contest both ordinances. The Town rescinded the 7 March ordinance and the court had before it no issues upon which to rule and no facts upon which to decide, and petitioner received the relief that it requested in this action—withdrawal of the 7 March ordinance. Petitioner exhausted all avenues in which the amended petition could have been properly considered by the court as admissible evidence and the court was not obliged to consider it when ruling upon the motion for summary judgment.

6. Municipal Corporations § 47 (NCI4th)—annexation—ordinance rescinded and re-adopted—notice and public hearing

Summary judgment for defendant-Town on a challenge to an annexation ordinance was properly granted where the Town passed the first ordinance on 7 March, then deleted some language and re-adopted it on 20 March, and petitioner contends that the Town had a duty under N.C.G.S. § 160A-37 to notify citizens in the annexed area of the rescission and to hold a new public hearing on the re-adoption. There is no legal authority for the contention that the Town had a duty to give notice of the rescission and the issue of a new public hearing need not be resolved here since petitioner did not have authority as a matter of right or by leave the court to amend the original petition to include a challenge of the 20 March ordinance.

Appeal by petitioners from judgment entered 15 August 1996 by Judge Louis Meyer in Harnett County Superior Court. Heard in the Court of Appeals 21 October 1997.

Bain & McRae, by Edgar R. Bain, attorney for petitioners-appellants.

Stewart, Hayes & Williams, P.A., by Vernon K. Stewart, attorney for respondent-appellee.

WYNN, Judge.

These two civil actions, *Chicora Country Club, Inc. et al. v. Town of Erwin*, 96-CVS-00687, and its companion case, *Chicora Country Club, Inc. et al. v. Town of Erwin*, 96-CVS-00581, relate to the contest of virtually identical annexation ordinances adopted on 7 March and 20 March of 1996 by the Town Board of the Town of Erwin.

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In 96-CVS-00687, the sole issue raised for our consideration is whether the Superior Court of Harnett County properly dismissed appellants' petition for review of the annexation ordinance adopted by the Town of Erwin on 20 March 1996. Under relevant North Carolina statutory law, persons desiring to challenge an annexation ordinance must file a petition for review within thirty (30) days of the passage of the ordinance in order to vest the superior court with jurisdiction to review the ordinance. N.C. Gen. Stat. § 160A-38 (1995). As Chicora Country Club's petition for review was not filed within the 30 days required by statute, we hold that the Superior Court of Harnett County did not have jurisdiction to review the petition, and that as such, the trial court properly granted the Town's motion to dismiss Chicora Country Club's action.

In 96-CVS-00581, Chicora Country Club moved to amend its petition for review of an annexation ordinance adopted by the Town of Erwin on 7 March 1996 and subsequently rescinded by the Town on 20 March 1996. The trial court, however, denied that motion and then granted the Town's Motion for Summary Judgment on grounds that Chicora Country Club's action was moot. Because we find no abuse of discretion by the trial court in denying the Chicora Country Club's Motion to Amend, we affirm the trial court's ruling as to that motion. Furthermore, because the Town of Erwin rescinded the annexation ordinance which was the subject of Chicora Country Club's petition, we also affirm the trial court's grant of summary judgment in favor of the Town of Erwin on grounds that the action was moot.

Facts and Procedural History of Both Cases

On 7 March 1996, the Town Board of Erwin adopted an annexation ordinance to extend the corporate limits of the Town by annexing land owned by Chicora Country Club. In response, on 1 April 1996, Chicora Country Club petitioned the Superior Court of Harnett County (*Chicora Country Club, Inc. et al. v. Town of Erwin*, 96-CVS-00581) to review the 7 March ordinance.

In the meantime, unbeknownst to Chicora Country Club, the Town Board of Erwin called a special meeting on 20 March 1996 in which it re-adopted the 7 March annexation ordinance after removing certain conditional language it believed rendered the original ordinance invalid. The minutes of this special meeting were not made a part of the public record until 5 April 1996. Sometime after that date, Chicora Country Club learned of the meeting and on 22 April 1996, it filed a second petition in the Superior Court of Harnett County

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(*Chicora Country Club, Inc. et al. v. Town of Erwin*, 96-CVS-00687) to review the 20 March 1996 annexation ordinance. In response, on 13 May 1996, the Town of Erwin moved to dismiss this second petition on the grounds that it was not timely filed. Thereafter, on 30 May 1996, Chicora Country Club filed a purported amended and supplemental petition to contest not only the 7 March ordinance but also the 20 March ordinance. Apparently realizing that leave of court was required to amend the original petition of 1 April (30 days had elapsed), Chicora Country Club moved the court on 2 July 1996 to allow an amendment of its 1 April petition to include not only a review of the 7 March ordinance, but also a review of the 20 March 1996 ordinance.

On 21 May 1996, the Town Board called another special meeting in which it rescinded the ordinance originally adopted on 7 March 1996. Following this action, the Town of Erwin moved for summary judgment on Chicora Country Club's petition against the 7 March ordinance on the grounds that the matter was made moot by the Town's rescission of the ordinance.

After hearing the motions, the trial court dismissed Chicora Country Club's 22 April petition to review the 20 March ordinance on the grounds that it was not timely filed and that therefore, the court lacked subject matter jurisdiction. The court also denied Chicora Country Club's Motion to Amend the 1 April petition to include a review of the 20 March ordinance and granted summary judgment for the Town of Erwin on Chicora Country Club's 1 April petition on the grounds that the action was moot. Chicora Country Club appeals.

Preliminary Issues in Both Cases

[1] At the outset, we note that Chicora Country Club failed to comply with numerous provisions of the North Carolina Rules of Appellate Procedure in preparing the record on appeal, most notably Rules 28(b)(4) and (5). Chicora Country Club violated Rule 28(b)(4) by failing to make reference to any of the pages in the transcript proceedings, the Record on Appeal, or exhibits in its Statement of the Case and Facts. In that same vein, it made no references to any of these sources in the body of the Argument section of its brief. *See State v. Wilson*, 58 N.C. App. 818, 294 S.E.2d 780 (1982). Additionally, Chicora Country Club violated Rule 28(b)(5) by failing to follow the arguments in its brief with assignments of error pertinent to those questions and identified by the numbers and pages at which the assignments appeared in the Record on Appeal.

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Based upon these abuses of Rule 28, Chicora Country Club's appeal is subject to dismissal. *Northwood Homeowners Assn. v. Town of Chapel Hill*, 112 N.C. App. 630, 436 S.E.2d 282 (1993). However, "in order to prevent manifest injustice" to Chicora Country Club, we nonetheless decide, pursuant to our discretionary authority under Rule 2 of the Rules of Appellate Procedure, to address the merits of these appeals.

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[2] In this appeal, Chicora Country Club argues that its petition for review of the 20 March annexation ordinance was timely filed, and that therefore, the trial court erred in dismissing its action for lack of jurisdiction. We disagree.

N.C. Gen. Stat § 160A-38 sets forth the procedure a party must follow to perfect an appeal from an annexation ordinance adopted by the governing board of a municipality having a population of less than 5,000. It provides in pertinent part that "within 30 days following the passage of an annexation ordinance . . . , any person owning property in the annexed territory . . . may file a petition in the superior court . . . seeking review of the action of the governing board." N.C.G.S. § 160A-38(a) (emphasis added). In interpreting this particular provision of the statute, our courts have held that "compliance with this provision is a condition precedent to perfecting appellate jurisdiction in the superior court for the review of an annexation ordinance." *Ingles Markets, Inc. v. Town of Black Mountain*, 98 N.C. App. 372, 373, 390 S.E.2d 688, 690 (1990); *see also Gaskill v. Costlow*, 270 N.C. 686, 155 S.E.2d 148 (1967) (stating that "plaintiffs' action should have been dismissed on account of their failure, within thirty days following passage of said Annexation Ordinance, to file a petition in the Superior Court . . .").

In anticipation of this Court's application of *Ingles Markets* and *Gaskill* to the facts of this case, Chicora Country Club argues that those two cases are not controlling here because the filing of a petition was not at issue in either of those cases. To be sure, in *Ingles Markets*, the issue before the Court was not the thirty day provision in N.C.G.S. § 160A-38(a) because in that case, no petition for review was ever filed in the superior court. Instead, the issue before the *Ingles Markets* Court was whether the superior court was divested of jurisdiction once the challenged ordinance was remanded to the Town, such that further challenges by opponents of the ordinance could only be made upon the filing of a new petition for review.

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Likewise, in *Gaskill*, no petition for review was filed in the superior court; rather, the challengers of the ordinance sought a declaratory judgment and a writ of mandamus. As such, the issue before our Supreme Court in that case was whether the petition for review was the exclusive means of contesting an annexation ordinance.

Notwithstanding the differences in the factual issues before the *Ingles Markets* and *Gaskill* Courts and the issue before this Court today, we find that *Ingles Markets* and *Gaskill* are controlling on the law. In both cases, the Appellate Courts made the rule regarding the appeal of an annexation ordinance unmistakably clear—“[a]n appeal from the passage of an annexation ordinance by a municipality . . . must be taken within 30 days following such passage” in order to confer jurisdiction on the superior court. *Ingles Markets*, 98 N.C. App. at 373, 390 S.E.2d at 690; *Gaskill*, 270 N.C. at 689, 155 S.E.2d at 150.

In this case, the ordinance challenged by Chicora Country Club was passed by the Town board on 20 March 1996.¹ Chicora Country Club filed its petition for review of that ordinance on 22 April 1996. The thirty days afforded by the statute expired on 19 April 1996. Because of this failure to timely file that petition, the trial court had no jurisdiction to review the challenged ordinance, and it therefore, properly dismissed Chicora Country Club’s action.

[3] Chicora Country Club next argues that even if it failed to timely file the petition, the trial court should have exercised discretion under Rule 6(b) of the North Carolina Rules of Civil Procedure and allowed the petition to be filed on grounds of excusable neglect. Again, we disagree.

Rule 6(b) of the Rules of Civil Procedure provides in pertinent part:

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before or as extended by a previous order. Upon motion made after the expi-

1. Without citing any authority, Chicora Country Club argues in their brief to this court that the “passage” of an ordinance, as contemplated by the statute, does not officially occur until “the full text of the ordinance can be read, examined and copied so that interested parties can fully comprehend its effect.” In our opinion, however, an ordinance is “passed” when voted on by the governing board of the municipality, not when the Town’s citizens are notified of the adoption of that ordinance.

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ration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect.

N.C. Gen. Stat. § 1A-1, Rule 6(b) (emphasis added).

In exercising its discretion under Rule 6(b), our courts have consistently held that a trial court's authority to extend the time specified for doing a particular act is limited to "the computation of [those] time period[s] prescribed by *the Rules of Civil Procedure*." *Riverview Mobile Home Park v. Bradshaw*, 119 N.C. App. 585, 587-88, 459 S.E.2d 283, 285 (1995) (quoting *Lemons v. Old Hickory Council*, 322 N.C. 271, 275, 367 S.E.2d 655, 657, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988)); *see also Obsorne v. Walton*, 110 N.C. App. 850, 431 S.E.2d 496 (1993). Here, the thirty day time limitation for filing a petition for review of an annexation ordinance is not a limitation contained in the Rules of Civil Procedure; rather, it is a mandate set forth by our legislature in N.C.G.S. § 160A-38 which must be met in order to confer jurisdiction on the superior court to review the challenged ordinance. Therefore, we hold that even if Chicora Country Club could demonstrate to the trial court's satisfaction that the failure to timely file the petition for review of the 20 March 1996 annexation ordinance was a result of excusable neglect, the trial court in this case had no authority under Rule 6(b) to extend the time Chicora Country Club had to file that petition.

Accordingly, we find that the trial court properly dismissed the 22 April petition to review the 20 March ordinance because it lacked subject matter jurisdiction over the matter.

96-CVS-00581**Motion to Amend**

[4] In this appeal, Chicora Country Club first contends that the trial court erred by denying its 2 July motion to amend its petition of 1 April to include a review of not only the 7 March ordinance but also the 20 March ordinance because: (1) there was no evidence which tended to show that the Town would have been prejudiced if Chicora Country Club were allowed to amend, or that Chicora Country Club sought to amend the complaint in bad faith; and (2) the trial court set forth no reason or explanation in its order for denying Chicora Country Club's Motion to Amend. We find no merit in this contention.

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Rule 15(a) of the North Carolina Rules of Appellate Procedure provides that:

a party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one in which no responsive pleading is permitted . . . he may amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court . . . and leave shall be freely given when justice so requires.

Here, Chicora Country Club filed the original petition on 1 April 1996 and sought to amend that petition on 30 May 1996, more than 30 days after the original petition was filed; therefore, Chicora Country Club could only amend the petition by leave of court.

Our courts have consistently held that a motion to amend a pleading should be freely allowed by the trial court. *Markham v. Johnson*, 15 N.C. App. 139, 189 S.E.2d 588 (1972); *Galligan v. Smith*, 14 N.C. App. 220, 188 S.E.2d 36 (1972). However, the denial of such a motion is accorded great deference and will not be overturned absent an abuse of discretion. *North River Insurance Co. v. Young*, 117 N.C. App. 663, 453 S.E.2d 205 (1995). An abuse of discretion occurs when the trial court's ruling "is so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). When determining whether a trial court's denial was indeed the result of a reasoned decision, the appellate court may, in the absence of any declared reason for the denial of leave to amend, examine any apparent reasons for such a denial. *Kinnard v. Mecklenburg Fair, Ltd.*, 46 N.C. App. 725, 727, 266 S.E.2d 14, 15 (1980) (citing *Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E.2d 782 (1978)).

In the instant case, the trial court's order denying the motion to amend does not contain any specific findings of fact supporting the court's denial. However, the court's order does state that the "interests of justice [would] not be served by granting the requested relief." Moreover, our review of the hearing transcript convinces us that the trial court's denial of Chicora Country Club's motion to amend was to prevent Chicora Country Club from unfairly extending the time to challenge the 20 March ordinance after it had become apparent that its second action would likely be dismissed for failure to timely file that petition. Accordingly, we hold that the trial court's decision in this case was a reasoned one made to prevent unfair prejudice to the

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Town of Erwin, and that therefore, it did not abuse its discretion in denying Chicora Country Club's Motion to Amend.

Summary Judgment Motion

[5] Chicora Country Club next contends that the trial court erred in granting the Town's Motion for Summary Judgment on grounds that its 1 April petition was moot. Chicora Country Club contends that the initial action brought was not moot because prior to the hearing on the Town's Motion for Summary Judgment, it filed on 30 May 1996 a petition that purportedly amended its 1 April petition by alleging the invalidity of the 20 March annexation ordinance. Given this filing, Chicora Country Club argues that there were issues before the court which were ripe for its determination. We disagree.

Under our Rules of Civil Procedure, summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Roberts v. Madison County Realtors Assn.*, 121 N.C. App. 233, 465 S.E.2d 328 (1996). Evidence properly considered on a motion for summary judgment "includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file . . . affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken." *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971) (emphasis added).

It is also a well-settled principle of civil procedure that when, in the course of litigation, "it develops that the relief sought [by a party] has been granted or that the questions originally in controversy between the parties are no longer at issue," the case should be dismissed as moot. *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978).

In the instant case, the Town of Erwin rescinded the 7 March annexation ordinance. Therefore, when ruling upon the Town's Motion for Summary Judgment, the trial court had before it no issues upon which to rule and no facts upon which to decide. Indeed, Chicora Country Club received the relief that it had requested in this particular action—a withdrawal of the 7 March annexation ordinance. The trial court was therefore correct in granting the Town's Motion for Summary Judgment.

The fact that Chicora Country Club filed an amended petition seeking review of the March 20 annexation ordinance does not alter

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the above conclusion where, as here, Chicora Country Club's amendment to their original petition was not evidence which the trial court was obliged to consider when deciding upon the Town's Motion for Summary Judgment. As discussed above, under Rule 15A, "if the pleading is one which no responsive pleading is permitted, and the action has not been placed on the trial calendar," a party may amend his complaint as a matter of right at any time within thirty (30) days after it was served; otherwise, a party is required to request leave of court in order to amend. *See* Rule 15A (emphasis added). In this case, Chicora Country Club had no right under Rule 15A to amend the petition of the annexation ordinance because it did not file the amended petition within the required 30 days after the original petition was filed; and, the trial court did not abuse its discretion in not allowing Chicora Country Club to amend the petition by leave of court. Under these circumstances, it is clear that Chicora Country Club exhausted all avenues in which the amended petition could have been properly considered by the court as admissible evidence. As such, Chicora Country Club's attempt to amend the petition was not "material which would [have been] admissible in evidence" and therefore, the trial court was not obliged to consider it when ruling upon the Town's Motion for Summary Judgment. Accordingly, we find no error in the trial court's grant of summary judgment in favor of the Town of Erwin on grounds that Chicora Country Club' action was moot.

[6] Finally, Chicora Country Club contends that this Court should nonetheless reverse the trial court's order granting the Town's Motion for Summary Judgment because the Town Board of Erwin acted unlawfully when it rescinded the 7 March 1996 ordinance and then re-adopted it on 20 March 1996. According to Chicora Country Club, the Town was under a duty, pursuant to N.C. Gen. Stat. § 160A, to both notify the citizens in the proposed annexation area of the rescission and to hold a new public hearing once they had decided to re-adopt the rescinded ordinance.

N.C. Gen. Stat. § 160A-37 sets forth the procedure that a governing board of a town of less than 5,000 must follow before it can annex territory from its citizens. That statute provides in pertinent part:

- (a) Notice of Intent.—Any municipal governing board desiring to annex territory under the provisions of this Part shall first pass a resolution stating the intent of the municipality to consider annexation. Such resolution shall describe the boundaries

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of the area and fix a date for a public hearing on the question of annexation . . .

(b) Notice of Public Hearing.— . . . Such notice shall be given by publication once a week for at least two successive weeks prior to the date of the hearing in a newspaper having general circulation in the municipality If there be no such newspaper, the municipality shall post notice in at least five public places in the area to be annexed for 30 days prior to the date of the public hearing

(e) *Passage of the Annexation Ordinance.*—The municipal governing board shall take into consideration facts presented at the public hearing and shall have authority to amend the report required by G.S. 160A-35 to make changes in the plans for serving the area proposed to be annexed so long as such changes meet the requirements of G.S. 160A-35. At any regular or special meeting held no sooner than the tenth day following the public hearing and not later than 90 days following such public hearing, the governing board shall have authority to adopt an ordinance extending the corporate limits of the municipality to include all, or such part, of the area described in the notice of public hearing which meets the requirements of G.S. 160A-36 and which the governing board has concluded should be annexed

With regard to whether the Town board of Erwin was under a duty to give Chicora Country Club notice of the fact that they had rescinded the 7 March 1996 ordinance, Chicora Country Club has cited no legal authority to support that position and we can find no provision in N.C.G.S. § 160A-37 or any other statute in chapter 160A which would impose such a duty upon the Town of Erwin.

As to the issue of whether N.C.G.S. § 160A-37 required the Town to provide Chicora Country Club with a new public hearing upon the governing board's decision to re-adopt the 7 March ordinance on 20 March 1996, we conclude that we need not resolve that issue here as we have already concluded that Chicora Country Club has no authority, as a matter of right or by leave of court, to amend the original petition to include a challenge of the 20 March ordinance. To challenge the 20 March ordinance, Chicora Country Club should have timely brought a direct appeal as it did with the 7 March ordinance. There being no direct appeal before us concerning the validity of the 20 March 1996 ordinance, the issue of whether the Town of Erwin was

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under a duty to provide Chicora Country Club with a second hearing before adopting that particular ordinance is moot.

CONCLUSION

In sum, we affirm the trial court's judgments dismissing the petition for review of the 20 March ordinance, denying the motion to amend Chicora Country Club's original petition and granting the Town of Erwin's motion for summary judgment.

Affirmed.

Judges WALKER and SMITH concur.

THE HOME INDEMNITY COMPANY, THE HOME INSURANCE COMPANY, AND CITY INSURANCE COMPANY, PLAINTIFFS v. HOECHST CELANESE CORPORATION; AETNA CASUALTY & SURETY COMPANY; AIU INSURANCE COMPANY; ALL-STATE INSURANCE COMPANY; AMERICAN CENTENNIAL INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; AMERICAN MOTORIST INSURANCE COMPANY; AMERICAN PROFESSIONALS INSURANCE COMPANY; AMERICAN RE-INSURANCE COMPANY; ASSOCIATED INTERNATIONAL INSURANCE COMPANY; BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA; CALIFORNIA UNION INSURANCE COMPANY; CENTENNIAL INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYD'S LONDON AND CERTAIN LONDON MARKET INSURANCE COMPANIES; CERTAIN UNDERWRITING SYNDICATES OF THE ILLINOIS INSURANCE EXCHANGE; CERTAIN UNDERWRITING SYNDICATES OF THE INSURANCE EXCHANGE OF THE AMERICAS; CIGNA INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; COMMERCIAL UNION INSURANCE COMPANIES; CONTINENTAL CASUALTY COMPANY; CONTINENTAL INSURANCE COMPANY; CRUM & FORSTER INSURANCE COMPANY; EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY; EMPLOYERS MUTUAL CASUALTY COMPANY; ERIC REINSURANCE COMPANY; EXCESS INSURANCE COMPANY, LIMITED; FEDERAL INSURANCE COMPANY; FIREMAN'S FUND INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY; FREMONT INDEMNITY INSURANCE COMPANY; GIBRALTAR CASUALTY COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY (GEICO); HARBOR INSURANCE COMPANY; HARTFORD ACCIDENT AND INDEMNITY COMPANY; HIGHLANDS INSURANCE COMPANY; HUDSON INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; INTERNATIONAL SURPLUS LINES INSURANCE COMPANY; LEXINGTON INSURANCE COMPANY; LONDON GUARANTEE AND ACCIDENT COMPANY OF NEW YORK; LUMBERMEN'S MUTUAL CASUALTY INSURANCE COMPANY; MEADOWS SYNDICATE, INC.; NATIONAL CASUALTY COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, P.A.; NEW ENGLAND INSURANCE COMPANY; NEW ENGLAND REINSURANCE COMPANY; NORTH RIVER INSURANCE COMPANY; NORTH STAR REINSUR-

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ANCE CORPORATION; NORTHWESTERN NATIONAL CASUALTY COMPANY; NORTHWESTERN NATIONAL INSURANCE COMPANY; PACIFIC INSURANCE COMPANY; PROGRESSIVE AMERICAN INSURANCE COMPANY; PRUDENTIAL REINSURANCE COMPANY; ROYAL INDEMNITY COMPANY; SIGNAL INSURANCE COMPANY; ST. PAUL FIRE AND MARINE INSURANCE COMPANY; STONEWALL INSURANCE COMPANY; TORTUGA CASUALTY INSURANCE COMPANY; THE TRAVELERS INDEMNITY COMPANY; TWIN CITY FIRE INSURANCE COMPANY; VIK RE SYNDICATE, INC.; UNDERWRITERS REINSURANCE COMPANY; UNITED INSURANCE COMPANIES, INC.; X.L. INSURANCE COMPANY LIMITED; ZURICH INSURANCE COMPANY; DEFENDANTS

No. COA97-321

(Filed 16 December 1997)

1. Courts § 19 (NCI4th)— stay to permit trials in other jurisdictions

In an action to determine insurance coverage for environmental contamination claims at ninety-four sites in twenty states, the trial court did not abuse its discretion by entering an order staying further litigation in North Carolina concerning sites located outside this state and allowing the parties to file suits in other states concerning sites located in those states after the court entered partial summary judgment declaring that the policies in question did not provide coverage for claims arising from certain North Carolina sites since the stay will not cause delay or create a greater possibility of inconsistent interpretations among the several states' laws; it will not waste discovery that has already taken place in this litigation because the insured has agreed to a universal case management order to facilitate litigation in all states; it will not result in substantial injustice to the parties because the case has become essentially a non-North Carolina case applying the law of other states; and the convenience of the witnesses and availability of evidence support the stay order. N.C.G.S. § 1-75.12.

2. Courts § 74 (NCI4th)— stay order—overruling of another judge—changed conditions

In an action to determine insurance coverage for environmental contamination claims at ninety-four sites in twenty states, the entry of partial summary judgment effectively ending controversies as to all North Carolina sites and plaintiffs' motion to amend the complaint to add 142 additional sites and claims to this case constituted changed conditions which permitted the trial

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judge to overrule another superior court judge's order lifting an earlier stay and permitting the controversy to proceed in this state by entering another order staying further litigation in North Carolina concerning sites located in other states and allowing the parties to file suits in other states concerning sites located in those states.

Appeal by plaintiffs and certain defendants from order entered 13 January 1997 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 1997.

This case concerns a dispute over insurance coverage for environmental contamination claims at ninety-four sites in twenty states around the United States. Hoechst Celanese Corporation (HCC), the insured, initially filed suit on 14 February 1989 in New Jersey state court seeking to determine that its primary insurance policies cover the environmental claims. The New Jersey state action was removed to a New Jersey federal district court in March 1989 on grounds of diversity. On 9 March 1989, the instant case, a more comprehensive environmental coverage action, was filed in North Carolina by plaintiffs, The Home Indemnity Company, The Home Insurance Company and City Insurance Company (Home) against defendant HCC and all of HCC's primary and excess coverage insurance carriers. This suit sought a determination of the rights and obligations of the parties under the policies which Home and the insurance company defendants negotiated and issued to HCC. Home sought a determination that it had no duty to defend or indemnify HCC for its environmental liabilities at sixty-one pollution sites in seventeen states. Upon HCC's motion pursuant to G.S. 1-75.12, the trial court by order dated 28 August 1989 stayed the North Carolina action. In 1992, HCC moved to amend the New Jersey action to include additional environmental claims and to name additional excess carriers as parties to the action. Because the addition of these parties to the federal court action destroyed diversity, the New Jersey federal action was remanded to New Jersey state court. The insurance company defendants moved to lift the stay in the North Carolina case arguing that the motion to amend the complaint in the New Jersey case warranted a modification of the North Carolina stay order. In December 1992, Judge James C. Downs found the North Carolina action was "the first comprehensive action to resolve the issues" and lifted the stay order in the North Carolina case. Almost simultaneously, a New Jersey state court judge agreed and stayed the New Jersey action.

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In 1993, by agreement of all parties, this case was designated as exceptional under Rule 2.1 of the General Rules of Practice and the Honorable Marvin K. Gray was assigned to preside over the entire matter. Over the next four years, Judge Gray presided over discovery efforts and entered case management orders. The case management orders refined the focus of the case, first to seven sites located in North Carolina, South Carolina, Texas and New Jersey chosen for written discovery, and later to two sites located in North Carolina and Texas chosen for depositions.

In August and November of 1996, the trial court entered partial summary judgment in favor of most of the insurance carriers, declaring that those insurers' policies do not cover the claims arising from the Salisbury sites. Appeals from these decisions are before this court. (See COA97-459, COA96-1408 and COA96-1435). In November 1996, plaintiffs sought to amend their complaint to add an additional fifty-nine sites and eighty-three claims against HCC. Only four of those additional sites are located in North Carolina.

On 13 January 1997, Judge Gray entered an order staying further litigation in North Carolina concerning sites located outside of North Carolina and allowed the parties to file suits in other states concerning sites located in those states. The order set a 30 April 1997 deadline for filing suit in other states.

On 21 January 1997, Home gave notice of appeal from the 13 January 1997 stay order and petitioned the North Carolina Supreme Court to bypass the North Carolina Court of Appeals in order to expedite the appeal. The Supreme Court denied the bypass petition.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Richard T. Rice and Reid C. Adams, Jr., for plaintiff-appellant The Home Indemnity Company.

Rivkin Radler & Kremer, by Richard S. Feldman, for defendant-appellants Commercial Union Insurance Company and Fireman's Fund Insurance Company.

Bennett & Blancato, by Richard Bennett, for defendant-appellants Commercial Union Insurance Company and Fireman's Fund Insurance Company.

Weissman Nowack Curry & Zaleon, P.C., by Linda B. Foster, for defendant-appellant Aetna Casualty and Surety Company.

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Underwood Kinsey Warren & Tucker, P.A., by C. Ralph Kinsey, Jr., for defendant-appellant Aetna Casualty and Surety Company.

Cohn & Russell, by Vicky Kaiser Russell, for defendant-appellants Century Indemnity Company, Successor to CCI Insurance Company, Successor to Insurance Company of North America.

Law Office of Mark A. Michael, by Mark A. Michael, for defendant-appellants Century Indemnity Company, Successor to CCI Insurance Company, Successor to Insurance Company of North America.

Mendes & Mount, LLP, by Henry Lee, for defendant-appellants Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies.

Kilpatrick Stockton, by Jackson N. Steele, for defendant-appellants Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies.

Melito & Adolfsen, P.C., by Louis G. Adolfsen and Catherine E. Rothman, for defendant-appellants Hartford Accident & Indemnity Company, First State Insurance Company, Twin City Fire Insurance Company and New England Insurance Company.

Cansler Lockhart Campbell Evans Bryant & Garlitz, P.A., by Hugh B. Campbell, for defendant-appellants Hartford Accident & Indemnity Company, First State Insurance Company, Twin City Fire Insurance Company and New England Insurance Company.

Parker, Poe, Adams & Bernstein, L.L.P., by Irvin W. Hankins III and Josephine H. Hicks, for defendant-appellee Hoechst Celanese Corporation.

Lowenstein, Sandler, Kohl, Fisher & Boylan, by Michael Dore and David Field, for defendant-appellee Hoechst Celanese Corporation.

EAGLES, Judge.

When evaluating the propriety of a trial court's stay order the appropriate standard of review is abuse of discretion. *Home Indem.*

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Co. v. Hoechst-Celanese Corp., 99 N.C. App. 322, 325, 393 S.E.2d 118, 120 (1990), *appeal dismissed and cert. denied*, 327 N.C. 428, 396 S.E.2d 611 (1990). A trial court may be reversed for abuse of discretion only if the trial court made “a patently arbitrary decision, manifestly unsupported by reason.” *Buford v. General Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994). Rather, appellate review is limited to “insur[ing] that the decision could, in light of the factual context in which it was made, be the product of reason.” *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986).

[1] The plaintiffs argue that staying the trial of the non-North Carolina claims and effectively severing this comprehensive action constitutes an abuse of discretion by the trial court. The plaintiffs argue that a comprehensive action is preferable for three reasons: 1) the “weight of authority” favors a comprehensive action; 2) a comprehensive action avoids delay; and 3) a comprehensive action avoids inconsistent interpretations of insurance policy language. These reasons are not persuasive individually or collectively.

The “weight of authority” cited by the plaintiffs are cases from other jurisdictions and thereby not binding. Delay will not necessarily result in trying the cases in the states where the sites are located. After eight years of comprehensive litigation, including four years of litigation in North Carolina, the insured has obtained a substantive ruling on only one out of ninety-four sites. Additionally, the problem with inconsistent interpretation of policy language will not be avoided by keeping non-North Carolina sites in North Carolina. If the stay order is reversed, the North Carolina courts would be required to determine which state’s law to apply to each claim, to find relevant facts at each site and then to apply the language to the facts under the applicable state law. The possibility of inconsistent interpretations among the several states’ laws is no less likely in North Carolina than in the courts of the several states.

The plaintiffs also argue that the stay order effectively wastes four years of litigation already expended in this action. However, HCC has agreed to a “universal case management order” to facilitate litigation in all eight states. Further there is no indication that courts in other states will require parties to re-conduct discovery that has already taken place in this litigation.

The plaintiffs next argue that affirming the stay order would work a “substantial injustice” on the parties. We disagree. G.S. 1-75.12 provides that a trial court should stay an action only if “the judge shall

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find that it would work a substantial injustice for the action to be tried in a court of this state." Relevant facts that may be considered include: the nature of the case, the applicable law, the convenience of witnesses, the availability of process to compel the attendance of witnesses, the ease of access to sources of proof, the burden of litigating matters of local concern in local courts, and other practical considerations which would make the trial easy, expeditious and inexpensive. *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co., Inc.*, 46 N.C. App. 707, 713, 266 S.E.2d 368, 371 (1980), *appeal dismissed and cert. denied*, 301 N.C. 93, 273 S.E.2d 299 (1980). Courts need not consider every factor. *Lawyers Mut. Liab. Ins. Co. of North Carolina v. Nexsen Pruet Jacobs & Pollard*, 112 N.C. App. 353, 357, 435 S.E.2d 571, 574 (1993).

By December 1996, this case had become essentially a non-North Carolina case. After Judge Gray entered partial summary judgment in COA97-459, COA96-1408 and COA96-1435, this litigation concerned the availability of insurance coverage for costs of clean up in environmental contamination situations in states other than North Carolina. With the North Carolina issues essentially resolved, the trial court reasonably concluded that continuing to litigate North Carolina coverage issues regarding the non-North Carolina sites was an unreasonable and unnecessary burden on the North Carolina courts.

While the issue of which states' law will apply is not resolved as to all the claims, the applicable law will not be North Carolina law. There are two competing views—the traditional view of *lexi loci* and the alternate site specific view. Traditionally, *lex loci* or the law of the place where a contract is made determines matters bearing on the execution, interpretation, and validity of the contract. *Computer Sales Int. v. Forsyth Mem. Hosp.*, 112 N.C. App. 633, 635, 436 S.E.2d 263, 265 (1993), *cert. denied*, 335 N.C. 768, 442 S.E.2d 513 (1994), see *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 238, 210 S.E.2d 181, 183 (1974). The alternate approach has been the site specific approach. In these types of environmental insurance contracts where there is no choice of law provision, "the state where the toxic waste comes to rest is the state whose law will apply, provided that it was reasonably foreseeable that the waste would come to rest there." *Leksi, Inc. v. Federal Ins. Co.*, 736 F. Supp. 1331, 1336 (D.N.J.) (1990). No matter which approach is followed in this litigation, North Carolina law will not be applied. Both parties to this suit are headquartered in states other than North Carolina. Further, the essential acts critical to determining where the contract was entered

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into and which states' law controls were almost all done outside North Carolina. This would require a North Carolina trial court to apply the law of at least one and perhaps as many as twenty other states.

Further, the convenience of witnesses and availability of evidence factors all favor affirming Judge Gray's stay order. The determination of coverage at each site will depend, at least in part, on the facts at each site. Those facts likely will be proven by witnesses who have worked at the site and know the history surrounding the site. Accordingly, we conclude that these factors militate in favor of affirming the stay order.

Generally it is more desirable to litigate local matters in local courts. *Motor Inn Management, Inc.*, 46 N.C. App. at 713, 266 S.E.2d at 371. Each state's court has an interest in issues concerning cleanup of environmental contamination in its own state. This factor also bolsters the trial court's decision to stay the coverage litigation in North Carolina for the non-North Carolina sites. Accordingly, we conclude that the trial court did not err when it stayed the North Carolina action and required site-specific litigation.

The appellants also argue that the trial court's decision should be reversed because there were no findings of fact or conclusions that a trial of all claims in North Carolina would work a substantial injustice. We disagree.

The Court found:

6. Considering the nature of this case, the applicable law, the convenience of witnesses, the availability of compulsory process to produce witnesses, the cost of obtaining attendance of witnesses, the relative ease of access to sources of proof, the burden of litigating matters not of local concern, the desirability of litigating matters of local concern in local courts, and other practical considerations, this court finds, prior to ruling on the pending motion to amend and HCC's pending motion for a trial date on the Pampa trial site, and in the exercise of its discretion, that the non-North Carolina sites in this case should be ruled on by courts of states in which those sites are located.

Paragraph six of the stay order lists the guiding factors for determining whether trying the entire case in North Carolina would work "substantial injustice." Because the trial court obviously considered those factors, and its consideration of those factors led the trial court to

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conclude that the non-North Carolina sites should be tried in their own states, the trial court's findings were sufficient to support the discretionary grant of a stay of the North Carolina litigation regarding the non-North Carolina sites.

[2] Plaintiffs also argue that there were no changed conditions to warrant Judge Gray's stay order overruling Judge Downs' 18 December 1992 order which lifted the earlier stay and permitted the controversy to proceed in North Carolina. Plaintiffs argue that it was error for the trial court to suggest that the partial summary judgment ruling at the North Carolina sites was a changed condition. Moreover, plaintiffs argue that their motion to amend would not have materially changed their case at all and therefore is not a change in condition. We are not persuaded.

The trial court has discretion to modify a prior superior court ruling when changed conditions warrant the modification. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 502, 189 S.E.2d 484, 489 (1972). Here, the trial court specifically found:

Since the entry of an order lifting the stay of this North Carolina action on December 18, 1992, significant developments and changed circumstances warrant a modification of that order, in the interests of justice and in the court's discretion in managing this case.

The changed circumstances were 1) the entry of partial summary judgment concerning the Salisbury, North Carolina site; and 2) the plaintiffs' motion to amend the complaint to add 142 additional sites and claims to the case. Each of these developments significantly changed the nature of the case. With these changes, the litigation in North Carolina is now essentially a non-North Carolina case applying the law of states other than North Carolina.

As to the partial summary judgment motion, Judge Gray applied the policy language interpreted under North Carolina law to the Salisbury sites effectively ending the controversies as to all the North Carolina sites. In the non-North Carolina cases, the trial court will have to reexamine and reinterpret the insurance policy language under the law of one or more states (other than North Carolina), determine the facts as to each of those sites and apply the relevant policy language. In short, the nature of case has been completely changed from a comprehensive case concerning sites located in North Carolina and elsewhere into a case now focused primarily on

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sites outside of North Carolina. Accordingly, we overrule this assignment of error.

For the reasons stated, we conclude that the trial court's entry of its 13 January 1997 stay order was a proper and rational exercise of its discretion and the order is affirmed.

Affirmed.

Judges WYNN and MARTIN, Mark D., concur.



TIMOTHY J. DWYER, ADMINISTRATOR OF THE ESTATE OF WENDY MICHELE DWYER, PLAINTIFF
v. JONATHAN MARGONO; P.T. USAHA SISTIM INFORMASI JAYA; IBM WORLD
TRADE CORPORATION; INTERNATIONAL BUSINESS MACHINES CORPORA-
TION; AND TRIANGLE RENT-A-CAR, INC., DEFENDANTS

No. COA97-135

(Filed 16 December 1997)

1. Automobiles and Other Vehicles § 440 (NCI4th)—rental car—negligent entrustment—summary judgment for rental company

The trial court did not err in an action arising from an automobile accident by granting summary judgment for Triangle Rent-A-Car on the issue of negligent entrustment where plaintiff argues that Triangle failed to exercise reasonable care in renting an automobile to defendant Margono in that it issued the automobile upon his presentation of his International driver's license and did not question him about his driving experience and credentials. *Thompson v. Three Guys Furniture Co.*, 122 N.C. App. 340, requires the owner of an automobile to ensure that the person to whom they are entrusting the car is properly licensed; the owner is under a duty to inquire further if the person is unable to produce driving credentials. The evidence here was that Margono possessed both an Indonesian license and an International driver's license and there was no evidence that he had ever been convicted of any traffic violations, so that an inquiry would not have been sufficient to put Triangle on notice that Margono was either an incompetent or reckless driver.

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[128 N.C. App. 122 (1997)]

2. Automobiles and Other Vehicles § 440 (NCI4th)—rental auto—accident—standard of care of rental company

There was no evidence in a negligence action arising from an automobile accident that defendant Triangle Rent-A-Car violated the standard of care in the rental car industry when it rented an automobile to defendant Margono where, assuming that Triangle had a duty to make an inquiry into Margono's driving background, there is nothing to indicate that an inquiry would have put Triangle on notice that Margono was an incompetent or reckless driver.

3. Automobiles and Other Vehicles § 446 (NCI4th)—rental car accident—car rented after previous accident—duty of care—not breached

Triangle Rent-A-Car did not breach its duty of reasonable care when it provided defendant-Margono with a second rental auto after a parking lot accident and Margono was involved in an accident fatal to plaintiff's decedent after driving extremely fast in hazardous conditions and crossing an interstate median. There was evidence which tended to show that Triangle had a written policy which stated that a customer's name would be entered as "DO NOT RENT" after one accident that was his or her fault, with limited exceptions only after investigation, but that the policy was never implemented. Even though it was stated by a police officer on the accident report that Margono was at fault in the parking lot accident, Triangle's employee determined from Margono's description that the other driver was at fault; Triangle was justified in making its own determination as to fault since this was a minor accident involving only property damage.

4. Automobiles and Other Vehicles § 446 (NCI4th)—rental care accident—driver as agent of rental company—no evidence

The trial court did not err by granting summary judgment for defendant Triangle Rent-A-Car on the agency issue where defendant Margono drove a Triangle car extremely fast in hazardous conditions, crossed the medium of an interstate, and was involved in a head-on collision in which plaintiff's decedent was killed. There was no evidence of an agency relationship between Triangle and Margono.

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[128 N.C. App. 122 (1997)]

Appeal by plaintiff from orders entered 30 October and 20 November 1996 by Judge A. Leon Stanback, Jr. in Durham County Superior Court. Heard in the Court of Appeals 21 October 1997.

Robinson & Lawing, L.L.P., by Robert J. Lawing, Jane C. Jackson, and H. Brent Helms, for plaintiff-appellant.

Wallace, Creech & Sarda, L.L.P., by John R. Wallace and Sheri L. Roberson; and Teague, Campbell, Dennis & Gorham, L.L.P., by George H. Pender, for defendant-appellee Triangle Rent-A-Car.

WALKER, Judge.

On 11 December 1994, an automobile driven by Joseph Bankston Harvard was struck head-on by a 1995 Nissan Altima driven by Jonathan Margono (Margono) and owned by Triangle Rent-A-Car (Triangle). Wendy Dwyer was a passenger in the Harvard automobile which was traveling west on Interstate 40, while Margono was traveling east. The weather conditions were extremely hazardous at the time due to heavy rain and gusty winds.

Minutes before the accident, First Sergeant Larry DeBose and First Sergeant William Ussery of the North Carolina Highway Patrol, who were both driving east on Interstate 40, were passed by Margono, who was traveling at an extremely high rate of speed, estimated to be in excess of 90 miles an hour. Sergeant DeBose radioed Trooper Don Helms, who was traveling west on Interstate 40, and requested that he stop the Margono vehicle. After clocking Margono's speed at 86 miles an hour, Trooper Helms crossed the median in an effort to stop Margono. Meanwhile, Sergeant Ussery, pulled into the left lane behind the Margono automobile and attempted to "pace" the Margono automobile. Margono, however, continued to pull away from Ussery even though Ussery's speed approached 90 miles an hour. Sergeant DeBose then observed the Margono automobile skid off the left side of the road. When Margono attempted to steer the automobile back onto the road, he lost control of the automobile, skidded across the median, careened off the guard rail and struck the Harvard automobile head-on, killing Wendy Dwyer. Margono was convicted of involuntary manslaughter in connection with the accident.

At the time of the accident, Margono, an Indonesian, was employed by P.T. Usaha Informasi Jaya, an Indonesian agent of IBM. Margono was in the United States to participate in a three-month pro-

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gram sponsored by IBM. IBM made arrangements for Margono to travel to the United States and provided him with food, an apartment and a rental automobile for his transportation. IBM had a corporate account with Triangle, who rented automobiles to the qualified attendees of the IBM program.

In 1988, while living in Indonesia, Margono obtained a Class C Indonesian license, by passing both written and driving tests, allowing him to operate a motorcycle. Margono drove a "medium-sized" motorcycle back and forth to work everyday. In July 1994, Margono obtained a Class A Indonesian license, authorizing him to drive an automobile. Margono was required to attend driving school, which consisted of classroom instruction and nine hours of behind-the-wheel training before passing both written and driving tests for his Class A license. After attaining his Class A license, Margono did not operate an automobile prior to his arrival in this country. On 14 October 1994, Margono used his Indonesian license to obtain an international driver's license. This license translates a person's home country driver's license into several languages and is used to interpret a foreign driver's license.

Prior to Margono's arrival in the United States on 31 October 1994, he received a residency package from IBM, which contained a list of driving rules and regulations regarding automobile operation. After Margono arrived, he attended two orientation programs sponsored by IBM, both of which included instruction on driver safety including driving on the right side of the road, observing traffic signals and speed limits along with basic information regarding traffic conditions in the United States. Between 31 October 1994 and 15 November 1994, Margono shared a rental automobile with another IBM attendee, Eric Chang, from Taiwan. Chang showed Margono how to drive on the right side of the road and Margono drove Chang's rental automobile on a few occasions around Raleigh. During this time period, Margono and Chang took trips to Washington, D.C., Grandfather Mountain and Orlando, Florida. Margono drove the rental automobile for a two-hour period on the trip to Orlando.

On 15 November 1994, Margono went to Triangle and requested a rental automobile of his own. He provided all the necessary information, completed a rental agreement and was provided a Ford Tempo. Triangle made no inquiry into Margono's previous driving experience, his ability to operate a vehicle or his familiarity with driving a vehicle in the United States. Between 15 November and 9 December 1994,

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Margono drove the rental automobile locally everyday, approximately 486 miles, without incident.

On 9 December 1994, Margono was involved in an accident in a Hardee's parking lot in Raleigh. Margono cut through the parking lot, attempted to pass an automobile that was in the process of parking and caused an accident. There was only minor property damage. Officer R.K. Johnson of the Raleigh Police Department investigated the incident, spoke to both drivers, found that Margono's improper passing caused the accident and completed an accident report. Margono requested that Ray Craig, the driver of the other automobile, call Triangle to disclose what had happened because Margono did not feel he could effectively explain the accident. Craig spoke with a Triangle employee about the accident and stated that Margono was found to be at fault. Triangle told Craig to have Margono return the automobile so that a replacement could be issued.

Margono drove the Ford Tempo to Triangle and spoke with employee Felice Johnson about the accident. Ms. Johnson looked at the vehicle, completed an accident report and asked Margono to write down what had happened. Based on Margono's description of the accident and the small amount of damage to the automobile, Ms. Johnson concluded that the accident was caused by the other driver and classified it as a "fender-bender." Ms. Johnson then exchanged the Ford Tempo for a 1995 Nissan Altima. Two days later, Margono was involved in the fatal accident on I-40.

On 6 June 1995, Timothy J. Dwyer (plaintiff), Administrator of the Estate of Wendy Michele Dwyer, filed an action against Margono, P.T. Usaha Sistim Informasi Jaya (P.T.), IBM World Trade Corporation, International Business Machines Corporation and Triangle, seeking damages for the wrongful death of his daughter, Wendy Dwyer (IBM World Trade Corporation and International Business Machines Corporation will be collectively referred to as "IBM"). After denial of motions to dismiss by IBM and Triangle, the parties reached a settlement with all defendants except Triangle.

Plaintiff claimed Triangle was liable for its negligent entrustment of an automobile to Margono and was also vicariously liable, as the owner of the rental automobile, for the conduct of Margono. Triangle moved for summary judgment on both claims and the trial court granted summary judgment in favor of Triangle on the negligent entrustment claim on 30 October 1996 and on the agency claim on 20 November 1996.

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Summary judgment should be granted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *see also Bogle v. Power Co.*, 27 N.C. App. 318, 219 S.E.2d 308 (1975), *disc. review denied*, 289 N.C. 296, 222 S.E.2d 695 (1976). The moving party has the burden of proving entitlement to summary judgment and the court, in ruling on the motion, must view the evidence in the light most favorable to the non-movant, with all inferences being drawn in the non-movant's favor. *Thompson v. Three Guys Furniture Co.*, 122 N.C. App. 340, 344, 469 S.E.2d 583, 585 (1996) (*citing Varner v. Bryan*, 113 N.C. App. 697, 440 S.E.2d 295 (1994) and *Averitt v. Rozier*, 119 N.C. App. 216, 458 S.E.2d 26 (1995)).

[1] Plaintiff first argues that the trial court committed reversible error in granting summary judgment in favor of Triangle on the issue of negligent entrustment.

Our Courts have determined that negligent entrustment has occurred when:

the owner of an automobile 'entrusts its operation to a person whom he knows, or by the exercise of due care should have known, to be an incompetent or reckless driver' who is 'likely to cause injury to others in its use.' As a result of his own negligence, the owner is liable for any resulting injury or damage proximately caused by the borrower's negligence.

Thompson, 122 N.C. App. at 346, 469 S.E.2d at 587 (*quoting Swicegood v. Cooper*, 341 N.C. 178, 180, 459 S.E.2d 206, 207 (1995)).

In the instant case, the only element of negligent entrustment that is in dispute is whether Triangle knew, or in the exercise of reasonable care should have known, of Margono's incompetence and recklessness. Plaintiff argues that Triangle failed to exercise reasonable care in renting an automobile to Margono because it did not question Margono about his driving experience and credentials, but rather issued the automobile upon Margono's presentation of his International driver's license. Plaintiff contends that sufficient evidence was presented to require the submission of this issue to the jury.

Plaintiff relies in part on *Thompson v. Three Guys Furniture Co.*, 122 N.C. App. 340, 469 S.E.2d 583 (1996) in support of its argument,

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contending that *Thompson* mandates an inquiry into the driving credentials of the person to whom the owner is entrusting his car.

In *Thompson*, the defendant corporation agreed to pay defendant Ray \$550.00 to paint its truck. Defendant corporation entrusted the truck to Ray without ensuring that he was properly licensed or inquiring as to his driving record. *Id.* at 342-43, 469 S.E.2d at 584-85. Ray subsequently drove the truck while intoxicated, crossed the center line, struck another vehicle and killed the driver. *Id.* at 341, 469 S.E.2d at 584. According to the evidence, if the defendant corporation had requested to see Ray's driver's license, he would not have been able to produce one as it had been revoked the prior year. Further, had the defendant corporation asked why Ray's license had been revoked, it would have learned that Ray had been convicted of numerous violations, including driving while impaired, driving on the wrong side of the road, reckless driving and unsafe movements. *Id.* at 342, 469 S.E.2d at 584. This Court held that summary judgment in favor of the defendant was improper because a genuine issue of fact existed as to whether the defendant knew or should have known that Ray was an incompetent or reckless driver. *Id.* at 347, 469 S.E.2d at 587.

We find the instant case to be distinguishable from *Thompson*. We construe *Thompson* to require the owner of an automobile to ensure the person to whom they are entrusting the car is properly licensed. If the person is unable to produce his driving credentials, the owner is then under a duty to inquire further. Here, the evidence showed that Margono possessed both an Indonesian license authorizing him to drive an automobile and an International driver's license. Further, there was no evidence that he had ever been convicted of any traffic violations. Thus, an inquiry into Margono's credentials would not have been sufficient to put Triangle on notice that Margono was either an "incompetent or reckless driver who is likely to cause injury to others. . . ."

[2] Plaintiff also contends that Triangle failed to exercise due care by violating the standard of care in the rental automobile industry when it rented the automobile to Margono.

Plaintiff presented evidence of the standard of care in the rental automobile industry through the expert testimony of Bill Wilson (Wilson), a former operations manager of a rental automobile business. Relying on his experience in the industry and his review of policy manuals of other rental automobile companies, Wilson testified that in 1994 the standard of care in the rental automobile industry for

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qualifying international drivers was to require some reasonable inquiry into the potential customer's familiarity with driving in the United States and their competence to operate an automobile in this country. Here, Triangle admits no inquiry was made.

Assuming Triangle had a duty to make an inquiry into Margono's driving background before entrusting a rental automobile into his care, the following facts would have been revealed: Margono had a Class C Indonesian driver's license which authorized him to drive a motorcycle; he had driven a motorcycle for approximately six years; Margono had a Class A Indonesian driver's license authorizing him to drive an automobile; he obtained this license by passing both written and driving tests after completing driver's training school and nine hours of behind-the-wheel instruction; he received a residency package from IBM which contained sections regarding driving safety and operation of an automobile in the United States; he participated in two IBM orientation programs, both of which included lectures on driving safety; he rode with another IBM employee over a two-week period enabling him to observe driving conditions; and he drove the other employee's rental automobile on several occasions. Thus, even if Triangle had engaged in the inquiries that Wilson testified were the standard of care in the industry, there is nothing to indicate Triangle would have been put on notice that Margono was an "incompetent or reckless driver who is likely to cause injury to others. . ." *Thompson*, 122 N.C. App. at 346, 469 S.E.2d at 587.

[3] Plaintiff further argues that Triangle breached its duty of reasonable care when it provided Margono with a second rental automobile after the accident in the Hardee's parking lot.

Plaintiff presented evidence which tended to show that Triangle had a written policy in place at the time of the exchange of vehicles which stated:

If a customer has "ONE" accident that is their fault, Richard will enter their name into the computer as a "DO NOT RENT." Only Shelton or myself can make an exception to this rule and only after we investigate all the facts surrounding the accident.

However, Triangle's evidence tended to show this policy was never implemented.

Even though Officer Johnson stated in the accident report that Margono was at fault in the accident in the Hardee's parking lot, Ms. Johnson determined from Margono's description of the accident that

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the other driver was at fault. Since this was a minor accident involving only property damage, Triangle was justified in making its own determination as to fault, even if the above-stated policy had been in effect.

We conclude that there was insufficient evidence to show that Triangle knew or should have known that Margono was an "incompetent or reckless driver who is likely to cause injury to others"—an essential element of a negligent entrustment claim. As such, the trial court did not err in granting summary judgment in favor of Triangle on this issue.

[4] Plaintiff next contends that the trial court erred in granting summary judgment to Triangle on the agency issue. As we find no evidence of an agency relationship between Triangle and Margono, we conclude this assignment of error to be without merit.

The order of the trial court is

Affirmed.

Judges WYNN and SMITH concur.

STATE OF NORTH CAROLINA, EX REL., JONATHAN B. HOWES, SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, PLAINTIFF-APPELLEE v. ORMOND OIL & GAS COMPANY, INC., DEFENDANT-APPELLANT

STATE OF NORTH CAROLINA, EX REL., JONATHAN B. HOWES, SECRETARY, NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, AND THE ENVIRONMENTAL MANAGEMENT COMMISSION, PLAINTIFFS-APPELLEES v. WILLIAM E. ORMOND, SR., AND ORMOND OIL & GAS COMPANY, INC., DEFENDANTS-APPELLANTS

No. COA97-69

No. COA97-71

(Filed 16 December 1997)

1. Appeal and Error § 423 (NCI4th)— assignment of error—reference to record—inaccurate

An assignment of error which referred to a page of the record that did not support the assignment of error was sufficient

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because of the limited facts in the case and because the sole assignment of error was so specific in nature. N.C. R. App. P. 10(c)(1).

2. Appeal and Error § 423 (NCI4th)— assignment of error—different issue argued

An assignment of error was addressed in the exercise of the Court of Appeals' discretion where the State contended that the appellant had argued an issue different from that presented in the assignment of error.

3. Judgments § 123 (NCI4th)— memorandum of settlement—specific performance ordered—findings as to agreement insufficient

The trial court erred by incorporating in its final judgment the terms of a proposed consent judgment, but may consider on remand whether the State is entitled to specific performance of the settlement, where the State brought an action against defendant to collect an unpaid civil penalty and investigative costs which had resulted from defendant's violation of groundwater regulations; the parties executed and signed a "Memorandum of Terms of Settlement" which provided that the parties would enter into a consent judgment to include a schedule for implementing a corrective action plan; the State prepared and signed a proposed consent judgment but defendant refused to sign it; and the trial court concluded that the State was entitled to specific performance of the settlement. The trial court apparently determined that the proposed consent judgment was an accurate memorialization of the parties' intent, but its findings do not support that conclusion. Assuming that defendant had a duty under the settlement agreement to propose an implementation schedule and breached that duty by not presenting a proposal, the breach of that duty was not tantamount to consenting to terms which were not included in the parties' settlement agreement and which were specifically rejected by defendant. However, on remand, the trial court may enter a judgment in accordance with the terms found in the settlement agreement.

Appeal by defendants-appellants from judgment entered 16 September 1996 by Judge Knox V. Jenkins in Johnston County Superior Court. Heard in the Court of Appeals 16 September 1997.

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Michael F. Easley, Attorney General, by Philip A. Telfer, Special Deputy Attorney General, for the State.

Spence & Spence, P.A., by Clint E. Massengill, attorney for defendant-appellant.

WYNN, Judge.

"A consent judgment is valid only if all parties give their unqualified consent at the time the court sanctions the agreement and promulgates it as a judgment." *Briar Metal Products, Inc. v. Smith*, 64 N.C. App. 173, 176, 306 S.E.2d 553, 555 (1983) (citing *Overton v. Overton*, 259 N.C. 31, 129 S.E.2d 593 (1963)). In this case, the trial court, at the State's request, ordered William E. Ormond, Sr. on behalf of himself and Ormond Oil & Gas Company, Inc. to comply with the terms of a proposed consent judgment. Because Ormond did not consent to the proposed consent judgment, we hold that the trial court erred in requiring Ormond to comply with the terms of that consent judgment and therefore, vacate the trial court's judgment. However, because we believe the State is, nonetheless, entitled to specific performance of the parties' settlement, we remand this case to the trial court for imposition of judgment in accordance with the terms of that agreement.

On 21 June 1995, the State of North Carolina brought this civil action in the Superior Court of Johnston County against Ormond, seeking to collect an unpaid civil penalty and investigative costs which had been assessed against Ormond as a result of his violation of regulations governing the State's groundwaters.

Sometime thereafter, the State moved for summary judgment; however, prior to hearing on that motion, the parties executed and signed a document entitled, "MEMORANDUM OF TERMS OF SETTLEMENT." That document provided, among other things, that the parties would enter into a consent judgment to be prepared by 20 November 1995 which would include in it a schedule for implementing a corrective action plan designed to help remedy the contamination caused by Ormond's actions.

Following the settlement conference, the State prepared and signed a proposed Consent Judgment; but, Ormond refused to sign it. As a result of Ormond's refusal, the State, contending that the proposed Consent Judgment was an accurate reflection of the settlement agreement, moved the trial court to enter judgment according to the

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terms of the proposed Consent Judgment. The trial court found that the proposed Consent judgment “fully and fairly reflect[ed] the agreed-upon terms of the Settlement.” From the judgment ordering Ormond to comply with the terms of the proposed Consent Judgment, Ormond appeals.

Ormond presents one assignment of error in this appeal:

The trial court erred in granting the plaintiff/appellee Judgment requiring Specific Performance of a settlement reached between the parties because a material issue of fact existed with regard to the issue of whether the terms of settlement between the parties included the requirement that the defendant/appellant implement a Corrective Action Plan.

Record, p.37

In response, the State asserts three arguments, two of which raise the preliminary issue of whether appellant, in bringing forth this assignment of error, complied with this state’s Rules of Appellate Procedure. We address the State’s procedural arguments in turn.

Preliminary Issues

[1] The State first presents the procedural argument that Ormond’s assignment of error does not sufficiently comply with Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure. Among other provisions, Rule 10 provides that on appeal, “[a]n assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.”

In the present case, Ormond references p. 37 of the record for its sole assignment of error. However, as the State correctly points out, that page references a statement in the record regarding testimonial evidence taken in the trial court. Given this error, the State contends that Ormond’s assignment of error does not adequately direct this court to the particular error assigned. We find, however, that because of the limited facts in this case and because the assignment of error is so specific in nature, Ormond’s assignment of error sufficiently directs this court to the particular error assigned.

[2] In its second procedural argument, the State contends that Ormond, by arguing an issue in its brief that is different from the issue presented in the assignment of error, failed to comply with Rule 10(a)

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of the Rules of Appellate Procedure. That section of Rule 10 states that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal. . . ." We, however, exercise our discretion under Rule 2 of the Rules of Appellate Procedure and decide here to address the merits of Ormond's assignment of error.

DISCUSSION

[3] In the judgment appealed from, the trial court found, in pertinent part, the following facts:

(4) The mediation conducted on November 3, 1995 resulted in a global settlement of all the above pending matters and the Settlement signed by William E. Ormond, Arthur Mouberry on behalf of the State and Counsel for both parties. A copy of the Settlement is attached hereto as "Exhibit I." The Settlement provided that a Consent Judgment would be entered in 95 CVS 1241 which would contain:

....

(b) provisions making the Consent Order (i.e., the preliminary injunction) entered on August 28, 1995 permanent, a schedule for implementation of a corrective action plan, and a requirement for continued compliance with rules for tank and line testing and leak detection; and

....

(5) Based on the foregoing, counsel for William Ormond, Sr. and William Ormond Oil and Gas Co., Inc., informed this Court that the above-captioned matters had been settled and that the Court need not rule on the pending Summary Judgment Rule 60(b) motions pending in 95 CVS 1135.

(6) Counsel for the parties reduced the Settlement to a Consent Judgment which fully and fairly reflects the agreed-upon terms of the Settlement.

(7) The State had demanded entry of the Consent Judgment, but William Ormond Sr., on behalf of himself and the Ormond Oil and Gas Co., Inc., has refused to sign the Consent Judgment despite his signature on the Settlement and the representations by his counsel to the Court that these matters were settled.

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Based upon these facts, the trial court concluded as a matter of law that "the State [was] entitled to specific performance of the Settlement by entry of Judgment implementing the terms of the Settlement." In the judgment, however, the trial court did not set forth the terms of the parties' settlement agreement; rather, it set forth as its order and decree, the exact terms of the States' *proposed* consent judgment, which included specific deadlines for implementation of the Corrective Action Plan. Apparently in so doing, and as evidenced by its findings of fact, the trial court determined that the proposed consent judgment was, as a matter of law, an accurate memorialization of the parties' intent regarding their settlement agreement. Based upon our review of the record, however, we are not convinced that the trial court's findings of fact support this conclusion.

Ormond argues that in signing the settlement agreement, it did not agree to a particular schedule for implementation of the Corrective Action Plan and that therefore, the Judgment entered by the court, which contains specific deadlines, is based upon an unenforceable agreement. The State, on the other hand, argues that under the terms of the parties' settlement agreement, Ormond had an obligation to present a schedule for implementation of the Corrective Action Plan to be included in the Consent Judgment contemplated by that agreement; that it breached that obligation by not proposing a schedule; and that therefore, it cannot now be heard to object to the court having entered a judgment which contained a specific schedule.

Assuming, *arguendo*, that Ormond had a duty under the terms of the settlement agreement to propose a implementation schedule for the Corrective Action Plan, and that it breached that duty by not presenting a proposal, the breach of that duty was not tantamount to consenting to terms which were not included in the parties' settlement agreement, and which were specifically rejected by Ormond when it refused to sign the proposed consent judgment incorporating those terms.

As the trial court's findings of fact note, the parties agreed to enter in a consent judgment which would incorporate the basic provisions outlined in their settlement agreement; they reduced that agreement to writing; and then they informed the court of that agreement. However, as these facts further disclose, Ormond was not in agreement with the final draft of the States' Consent Judgment, and he evidenced that disagreement by refusing to sign the Consent

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Judgment when the State demanded its entry as a judgment. Under our Rules of Civil Procedure, a consent judgment is not valid unless all parties express their unqualified consent; therefore, a party may withdraw his consent from a consent judgment at any time before a trial court sanctions the parties' agreement and promulgates it as a judgment. *Briar Metal Products, Inc.*, 64 N.C. App. at 176, 306 S.E.2d at 555 (citing *Overton v. Overton, supra*). The evidence showed that Ormond expressly refused to consent to the proposed Consent Judgment. As such, we hold that the trial court erred in incorporating in its final judgment the terms of the proposed consent judgment, which included specific deadlines for implementation of the Corrective Action Plan; accordingly, the trial court's judgment is vacated.

On remand, however, the trial court may consider whether the State is still entitled to "specific performance of the Settlement by entry of Judgment implementing the terms of the Settlement." It is well-settled in North Carolina that compromises and settlements of controversies between parties are favored by our courts. *PCI Energy Services, Inc. v. Wachs Technical Services, Inc.*, 122 N.C. App. 436, 439, 470 S.E.2d 566, 567 (1996) (citing *Nationwide Mutual Insurance Co. v. Aetna Cas. & Surety Co.*, 1 N.C. App. 9, 14, 159 S.E.2d 268, 273 (1968)). Although our courts have not laid down a precise method for the enforcement of such agreements, the general rule in other jurisdictions is that a party may enforce a settlement agreement by filing a voluntary dismissal of its original claim and then instituting another action on the contract, or it may simply seek to enforce the settlement agreement "by petition or motion in the original action." *Beirne v. Fitch Sanitarium, Inc.*, 167 F. Supp. 652, 654 (S.D.N.Y. 1958); see also *McKenzie v. Boorhem*, 117 F. Supp. 433 (W.D. Ark. 1954); *Wenneker v. Frager*, 448 S.W.2d 932 (Mo. App. 1969); *Kapiloff v. Asin Stores, Inc.*, 202 G.A. 292, 42 S.E.2d 724 (1943). This rule is annotated at 15 Am.Jur.2d, Compromise and Settlement § 38 with this editorial comment:

Instead of instituting an action to enforce a compromise agreement, a [party] who has already commenced an action on an antecedent claim may seek to enforce a comprise which was entered into subsequently to the commencement of the action, and he may have the compromise enforced simply by moving for judgment in accordance with the terms of the compromise. Even where a [party] is seeking to obtain some form of equitable relief, rather than a payment of money, he may obtain a judgment in

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accordance with the terms of a compromise agreement and may thereby obtain whatever performance the [other party] agreed to in the compromise agreement.

Here, the parties and their settlement agreement were still before the trial court when the State sought entry of the proposed consent judgment which, as the court's judgment makes clear, was actually a demand for specific performance of the parties' settlement agreement. By asking the court to enter judgment in accordance with what it believed were the terms of the parties' settlement agreement, the State evidenced its readiness to comply with the terms of that agreement and Ormond's refusal to do likewise. The trial court having concluded that the State was entitled to have the parties' settlement agreement enforced, we hold that the trial court may enter a judgment in this case in accordance with the terms found in the parties' settlement agreement.

Vacated and remanded.

Judges WALKER and SMITH concur.

APPALACHIAN OUTDOOR ADVERTISING CO., INC., PETITIONER-APPELLANT V.
TOWN OF BOONE BOARD OF ADJUSTMENT, RESPONDENT-APPELLEE

No. COA97-83

(Filed 16 December 1997)

Zoning § 49 (NCI4th)— nonconforming billboard—damaged but not destroyed—repairs allowed

The evidence did not support a town board of adjustment's decision that a billboard was destroyed in a storm and as a non-conforming use could not be reconstructed under the town's zoning ordinance; rather, the evidence showed that the billboard was merely damaged and in need of repairs as permitted by the zoning ordinance where the face of the billboard, although bent, was completely intact; only two of the three poles supporting the billboard were broken and replaced; the removable sign face was straightened and touched up with paint; and the cost of repairs was \$255 while the tax value of the billboard was \$2,607.

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[128 N.C. App. 137 (1997)]

Appeal by petitioner from order entered 16 August 1996 by Judge James L. Baker, Jr., in Watauga County Superior Court. Heard in the Court of Appeals 21 October 1997.

Wilson & Waller, P.A., by Betty S. Waller, attorney for petitioner-appellant.

David R. Paletta, attorney for respondent-appellee.

WYNN, Judge.

As a result of a storm occurring in January of 1995, a billboard owned by Appalachian Outdoor Advertising Co., Inc. and situated within the zoning jurisdiction of Boone, North Carolina was damaged, requiring Appalachian to replace two of the billboard's supporting poles. However, before Appalachian could finish its repair of the billboard, the Town of Boone informed Appalachian that its billboard, as a non-conforming structure, was prohibited by the Town's zoning ordinance from being "reconstructed" within the Town of Boone. Because there was insufficient evidence before the Boone Board of Adjustment to support this conclusion, we reverse the trial court's order affirming the Board of Adjustment's decision.

The billboard in question is actually one of two billboards owned and maintained by Appalachian within the zoning jurisdiction of the Town of Boone. Together, the two billboards have a maximum display area of 600 square feet and have two side by side sign faces. The billboards are illuminated and there is one electric service meter for both of the sign faces. The entire billboard structure—that is, both billboards together—consists of six wooden support poles, two sign faces and lights. By themselves, however, each billboard consists of a total of three support poles, a removable sign face and lights.

On or about 14 January 1995, one of the two billboards owned by Appalachian was damaged in a storm, causing two of that billboard's three supporting poles to break and the sign face to become mangled after blowing off the remaining support pole. As a result of this damage, Appalachian replaced the two broken poles and removed the bent sign face so that it could be straightened out and retouched with paint. After touching up the sign face, Appalachian intended to place the sign face back on the billboard's structure, but was stopped before doing so by an order issued by the Town of Boone's Building Inspector. The total cost of the repairs necessitated by the storm was \$255.00. The value of the billboard as assessed by the Watauga County tax collector was \$2,607.00.

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On 19 January 1995, the Building Development Coordinator of the Town of Boone informed Appalachian that its billboard, as a non-conforming structure, was prohibited from being "reconstructed" within the Town of Boone by Section 25.3.2(b) of the Town's zoning ordinance which provides that:

No building or structure devoted to a nonconforming use shall be enlarged, extended, reconstructed, moved, or structurally altered unless such building or structure is thereafter devoted to a conforming use.

In addition to the prohibitions contained in Section 25.3.2(b), the Town's zoning ordinance also allows for the repair of damaged non-conforming structures through Section 25.3.2(c). That section provides that:

When a building or structure devoted to a nonconforming use is damaged to the extent of fifty percent (50%) or more of its current market value, such building, if restored, shall thereafter be devoted to conforming uses.

Appalachian appealed the Building Development Coordinator's decision to the Town of Boone Board of Adjustment, which held an evidentiary hearing on 6 April 1995. At the conclusion of the hearing, the Board of Adjustment affirmed the decision of the Building Coordinator that Appalachian's billboard would "not be permitted to be reconstructed" as set forth by Section 25.3.2(c) of the Town's zoning ordinance.

Thereafter, Appalachian filed in Watauga Superior Court a petition for certiorari review of the Board of Adjustment's decision. The court granted the request, heard Appalachian's case, and affirmed the decision of the Town of Boone Board of Adjustment. From the trial court's order, Appalachian brings this appeal.

On appeal, Appalachian contends that the trial court erred in upholding the Board of Adjustment's decision not to permit it to reconstruct its billboard. According to the Boone Board of Adjustment, because Appalachian's billboard "was destroyed during the storm and flooding on the weekend of January 14, 1995," and "the framework for [the billboard] had to be totally replaced," the work Appalachian performed on its billboard constituted a "reconstruction" of the billboard, thereby invoking the prohibition against the reconstruction of non-conforming uses contained in section 25.3.2(b)

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of the Town's zoning ordinance. Appalachian argues, however, that the Board of Adjustment's conclusion was not supported by competent, material, and substantial evidence, and that the weight of the evidence before the Board supported the conclusion that the billboard was "repaired" as allowed under Section 25.3.2(c) of the Town's zoning ordinance, not "reconstructed" as prohibited by Section 25.3.2(b). With this argument, we agree.

When a superior court reviews the decision of a Board of Adjustment, the court sits as an appellate court. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 665 (1990). Although the Administrative Procedures Act (APA) does not provide judicial review for cities and other local units of government, a similar standard of review is employed to review the zoning decisions of town boards. *CG & T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 36, 411 S.E.2d 655, 658 (1992) (citing *Jennewein v. City Council*, 62 N.C. App. 89, 302 S.E.2d 7, *disc. review denied*, 309 N.C. 461, 307 S.E.2d 365 (1983)). In reviewing such decisions, our Supreme Court has held that the Superior Court should determine the following:

- (1) whether the Board committed any errors in law; (2) whether the Board followed the procedures specified by law in both statute and ordinance; (3) whether the appropriate due process rights of the petitioner were protected, including the rights to offer evidence, cross-examine witnesses, and inspect documents; (4) whether the Board's decision was supported by competent, material and substantial evidence in the whole record; and (5) whether the Board's decision was arbitrary and capricious.

Coastal Ready-Mix v. Board of Com'rs, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

When the specific issue raised on appeal to this court is whether a Board's decision was supported by competent, material and substantial evidence, our Supreme Court has further held that this court is to inspect all of the competent evidence which comprises the "whole record" so as to determine whether there was indeed substantial evidence to support the Board's decision. *Id.* Substantial evidence is that which a reasonable mind would regard as sufficiently supporting a specific result. *Walker v. North Carolina Dept. of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).

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Furthermore, if in applying the “whole record” test, reasonable but conflicted views emerge from the evidence, this court cannot substitute its judgment for the administrative body’s decision. *General Motors Corp. v. Kinlaw*, 78 N.C. App. 521, 523, 338 S.E.2d 114, 117 (1985). Ultimately, we must decide whether the decision “has a rational basis in the evidence.” *Id.*

In the subject case, our review of the whole record must begin by determining the meanings of the terms “reconstruct” and “repair.” As neither term is defined by the Town of Boone’s zoning ordinance, that determination must be based upon each terms’ normal meaning. See *CG&T*, 105 N.C. App. at 394, 411 S.E.2d at 659 (stating that “unless a term is modified or defined specifically within the ordinance in which it is referenced, then the term should be assigned its normal meaning”). The American Heritage Dictionary defines the term reconstruct as meaning “to construct again.” According to Webster’s Ninth New Collegiate Dictionary, to “construct” means to “make or form by combining or arranging parts or elements.” Implicit in that definition is the concept of beginning with nothing or starting from the beginning. In contrast, the dictionary meaning of the term “repair” is “to restore to sound condition after damage or injury” or “to restore by replacing a part or putting together what is torn or broken.” When considered together, the plain meanings of the terms “reconstruct” and “repair” demonstrate that when the original structure of an edifice is completely destroyed, it cannot at some later point in time be “repaired”; at most, it can be “reconstructed.”

In light of the foregoing definitions, we find that the record in this case, when viewed in its entirety, does not support the Board of Adjustment’s conclusion that the work performed on Appalachian’s billboard constituted a “reconstruction” of a non-conforming use. Instead, our review of the pleadings, testimony of witnesses and other evidence as whole reveals that the billboard was “damaged,” not “destroyed” during the storm and flooding of 14 January 1995.

First, the evidence before the Board showed that after the January 14 storm, the face of Appalachian’s billboard, albeit bent, was completely intact and that only two of the three poles supporting the billboard were broken and replaced. All other components of the billboard’s structure were either not damaged at all or were repaired and reusable. Based upon this evidence alone, the record indicates that petitioner’s billboard was not completely “destroyed” so as to require its “reconstruction.”

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Moreover, contrary to the assertions of the Boone Board of Adjustment in its brief, the record shows that the billboard was not dismantled by Appalachian and taken to the town of Lenoir for repair. To the contrary, the evidence of record tends to show that Appalachian took down the billboard's removable sign face—a process which was common for repairing sign faces—and then shipped it to Lenoir so that it could be straightened out and touched up with paint. At no time was the entire billboard dismantled and removed from its Boone site. Indeed, at every point in its restoration of the billboard, Appalachian had the original billboard structure, although damaged, from which to work. With the basic structure of the billboard still intact, it cannot be reasonably concluded that the billboard was in need of "reconstruction."

Second, the record shows that Appalachian's billboard was not being "reconstructed" because evidence before the Board concerning the amount and nature of the damage to the billboard, the nature and cost of repairs made to the billboard, and the value of the sign all establish conclusively that petitioner's billboard was repaired to less than 50% of its market value. Under Section 25.3.2(c) of the Town of Boone's zoning ordinance, to consider work performed on a structure as a "repair" of that structure, the cost of repairs cannot exceed 50% of the structure's market value. The record in this case reveals that the cost of the repairs petitioner made to the billboard was \$255.00, while the conservative tax value alone of the billboard was \$2,607.00. As such, we conclude that the weight of the evidence in this case shows that the work Appalachian performed on its billboard was done to "repair" the *damage* done to the billboard by the storm.

Accordingly, we hold that because the evidence on record clearly establishes that Appalachian's billboard was "damaged," not "destroyed," and that it was therefore in need of "repair," not "reconstruction," the Boone Board of Adjustment's decision to apply section 25.3.2(b)'s prohibition against the reconstruction of non-conforming uses to the facts of this case was not supported by competent, material and substantial evidence. For this reason, we further hold that the trial court erred as a matter of law in affirming the Board of Adjustment's decision to apply section 25.3.2(b) to this case.

Given the above holding, we need not discuss the other alternative assignments of error raised by Appalachian in this appeal. The judgment below is therefore,

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Reversed.

Judges WALKER and SMITH concur.

MILEY A. PERRY AND WIFE, NANCY A. PERRY, AND PERRY AND MOORFIELD, A NORTH CAROLINA GENERAL PARTNERSHIP, PLAINTIFFS V. CAROLINA BUILDERS CORPORATION, AND WILLIAM JOSLIN, AND CHARLES H. SEDBERRY AS TRUSTEES UNDER DEEDS OF TRUST OF RECORD IN THE WAKE COUNTY REGISTRY, DEFENDANTS

No. COA97-19

(Filed 16 December 1997)

1. Appeal and Error § 418 (NCI4th)— assignments of error—not referenced in brief

Plaintiffs' arguments on appeal were considered in the discretion of the Court of Appeals even though their assignments of error were not referenced in their brief in violation of N.C.R. App. P. 28(b)(5).

2. Mortgages and Deeds of Trust § 22 (NCI4th)—construction loan as first deed of trust—future advances—second deed of trust to seller—priority

The trial court properly dismissed a declaratory judgment action to determine lien priorities for failure to state a claim where plaintiffs sold vacant lots to Everlast; the sales were financed with a first lien to CBC through a construction loan deed of trust which also secured future advances; the loan documents expressly stated that funds under the lien were for the construction of dwellings on the properties; plaintiffs were accorded a second deed of trust securing a purchase money promissory note from Everlast; a substantial portion of the funds was not used for the construction of dwellings on the lots; plaintiffs received no payments; and Everlast filed for bankruptcy. Under N.C.G.S. § 45-70, all advances made under a future advances deed of trust meeting the conditions provided in N.C.G.S. § 45-68 retain the priority of the original security instrument from the recordation date thereof. Subsequent liens, even though recorded or filed prior to certain advances, are junior to all advances under the future advances deed of trust. Plaintiffs' complaint contained no

allegation that defendants' security instruments failed to conform to the requirements of N.C.G.S. § 45-68.

3. Banks and Other Financial Institutions § 59 (NCI4th)—application of loan proceeds—claim by property seller and subordinate lienholder—breach of fiduciary duty—no express agreement

The trial court properly granted defendants' motion to dismiss for failure to state a cause of action seeking monetary damages for breach of fiduciary duty by a construction lender with a higher priority lien where the proceeds were not used as intended, the borrower filed for bankruptcy, and plaintiffs, who had sold the secured property and who held the subordinate lien, received no payments. In the absence of an express contractual provision between the parties requiring defendant CBC to ensure application of the loan funds to an agreed purpose, plaintiffs were owed no such legal duty.

4. Fraud, Deceit, and Misrepresentation § 28 (NCI4th)—application of loan proceeds—claim against lender—fraudulent misrepresentation—no allegation of reasonable reliance

A claim for fraudulent misrepresentation against a construction lender by a subordinate lienholder who was also the seller of the property was properly dismissed under N.C.G.S. § 1A-1, Rule 12(b)(6) where there was no allegation of plaintiffs' reasonable reliance.

5. Unfair Competition or Trade Practices § 28 (NCI4th)—misapplication of loan proceeds—claim against lender—allegations insufficient

A claim for unfair or deceptive trade practices by a real estate seller and subordinate lienholder against the superior lienholder and lender arising from the application of loan proceeds was properly dismissed under N.C.G.S. § 1A-1, Rule 12(b)(6) for insufficient factual allegations.

Appeal by plaintiffs from judgment entered 22 November 1996 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 10 September 1997.

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Burns, Day & Presnell, P.A., by David W. Boone, for plaintiffs-appellants.

Smith, Debnam, Hibbert and Pahl, L.L.P., by Connie E. Carrigan and Byron L. Saintsing, for defendants-appellees.

JOHN, Judge.

Plaintiffs contend the trial court erred by granting defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) (1990) (Rule 12(b)(6)) for failure to state a claim upon which relief might be granted. We disagree.

Pertinent allegations by plaintiffs and procedural history include the following: Between 21 November 1994 and 28 February 1995, plaintiffs sold three real estate lots in Wake County to Everlast Builders, Inc. (Everlast). The properties consisted of Lot 4 of the Alslee Oaks Subdivision (Lot 4), and Lots 16 and 24 of the Olde South Trace Subdivision (Lot 16 and Lot 24). At the time each respective transaction was closed, the lot involved was vacant.

All sales were financed in an identical manner: defendant Carolina Builders Corporation (CBC) obtained a first lien on each parcel of property through a construction loan deed of trust, which also secured future advances, and plaintiffs were accorded a second deed of trust on the parcel securing a purchase money promissory note from Everlast. CBC's loan documents expressly stated that funds advanced under the lien were for the purpose of constructing dwellings on the properties in question.

According to the complaint, plaintiffs entered into the loan transactions "in anticipation of the construction of improvements consisting of a residential home on each of the lots." Pursuant to the future advances provisions of the loan agreements, CBC advanced \$206,730.00 to Everlast on Lot 4, \$218,383.00 on Lot 24, and \$126,000.00 on Lot 16. However, a substantial portion of these funds was not used for the construction of dwellings on the respective lots and, on 31 May 1995, Everlast filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of North Carolina.

No payments were received by plaintiffs on any of the three purchase money promissory notes, and plaintiffs subsequently filed the instant action against defendants seeking: (1) a declaratory judgment as to the "extent and priority" of the respective lien positions of plain-

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tiffs and defendants, and (2) monetary damages from CBC on account of (a) breach of fiduciary duty, (b) fraudulent misrepresentation, and (c) unfair and deceptive trade practices. Defendants' 7 August 1996 motion to dismiss plaintiffs' complaint pursuant to Rule 12(b)(6) was allowed by order of the trial court 22 November 1996. From that order, plaintiffs appeal.

[1] As a preliminary matter, we note that although the record on appeal designates four assignments of error, none are referenced at any point in plaintiffs' brief. N.C.R. App. P. 28(b)(5) requires a specific and detailed reference to the relevant assignment of error immediately following each question to be argued, and further provides that assignments of error not set out in an appellant's brief are deemed abandoned. However, in our discretion pursuant to N.C.R. App. P. (2), we elect to consider plaintiffs' arguments.

[2] A 12(b)(6) motion challenges whether a complaint states a legally sufficient cause of action. *Leandro v. State of North Carolina*, 122 N.C. App. 1, 6, 468 S.E.2d 543, 547 (1996), *aff'd in part, rev'd in part on other grounds*, 346 N.C. 336, 488 S.E.2d 249 (1997). Dismissal is appropriate if the complaint

is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim.

Forbis v. Honeycutt, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981).

Plaintiffs' first cause of action sought, *inter alia*, a judgment declaring that the lien of the deeds of trust securing repayment of the promissory notes held by Plaintiffs [are] superior in priority to the lien of the deeds of trust of Defendants. . . .

As to the viability of this cause of action in the face of a Rule 12(b)(6) challenge, plaintiffs argue that

[a] motion to dismiss a claim in an action for declaratory judgment is seldom appropriate since a claim for declaratory relief is sufficient if it alleges the existence of a real controversy arising out of the parties' opposing contentions.

We do not quarrel with the general principle advanced by plaintiffs. *See Morris v. Plyler Paper Stock Co.*, 89 N.C. App. 555, 557, 366 S.E.2d 556, 558 (1988) (declaratory judgment complaint which

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“alleges the existence of a real controversy arising out of the parties’ opposing contentions and respective legal rights under a deed, will or contract in writing,” is ordinarily sufficient to survive Rule 12(b)(6) motion). Further, it cannot be questioned that paragraph 20 of the instant complaint provides as follows:

[a]n actual controversy exists between the parties as to the validity and extent of the respective lien positions of the Plaintiffs and the Defendant Carolina Builders. . . .

However, assuming *arguendo* said paragraph constituted sufficient pleading of an actual controversy between the parties, the trial court nonetheless properly dismissed plaintiffs’ declaratory judgment claim due to “an absence of law to support a claim of the sort made,” *Forbis*, 301 N.C. at 701, 273 S.E.2d at 241; *see also Carter v. Stanley County*, 125 N.C. App. 628, 631-32, 482 S.E.2d 9, 11, *disc. review denied*, 346 N.C. 276, 487 S.E.2d 540 (1997) (“even though this matter presents a genuine controversy, plaintiffs have no basis for the relief they seek”).

Instruments securing future advances are governed by N.C.G.S. §§ 45-67 through 45-79 (1996). The priority of security instruments is covered by G.S. § 45-70, which states in pertinent part:

(a) Any security instrument which conforms to the requirements of this Article [Article 7 (“Instruments to Secure Future Advances and Future Obligations”)] shall, from the time and date of registration thereof, have the same priority to the extent of all future advances secured by it, as if all the advances had been made at the time of the execution of the instrument.

G.S. § 45-68 comprises the “requirements” section of Article 7 and provides, *inter alia*, as follows:

A security instrument, otherwise valid, shall secure future obligations which may from time to time be incurred thereunder so as to give priority thereto as provided in G.S. 45-70, if:

(1) Such security instrument shows:

- a. That it is given wholly or partly to secure future obligations which may be incurred thereunder;
- b. The amount of present obligations secured, and the maximum principal amount, including present and future obligations, which may be secured thereby at any one time;

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- c. The period within which such future obligations may be incurred, which period shall not extend more than 15 years beyond the date of the security instrument. . . .

Plaintiffs' complaint claims that, because defendant "was not obligated to advance funds . . . not used for construction of improvements on each of the parcels," the "funds advanced without an obligation to do so [we]re not secured by the lien of the applicable deed of trust." However, the controlling statutes cited above do not require application of future advances to any particular purpose in order to retain priority.

Had the General Assembly intended to impose upon commercial lenders the type of micro-management of loan proceeds that plaintiffs envision, "it was within their power, and not ours, to so provide." *Dare County Bd. of Educ. v. Sakaria*, 127 N.C. App. 585, 492 S.E.2d 369 (1997). As a leading authority points out:

[A] number of states . . . permit all future advances to take the same priority as the original mortgage, regardless of their optional character. Most of these statutes also require a definite statement in the mortgage of the maximum amount that will be advanced under it, and withdraw priority for advances which exceed the amount stipulated The statutes usually exalt the mortgage above all types of intervening liens. . . . While a few of the statutes apply only if the future advances are for improvements to the real estate or for similar purposes, most make no requirement concerning the use of the advances.

Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law, § 12.7 at 932-33 (3d ed. 1994) (citations omitted).

Therefore, under G.S. § 45-70, as in most statutes referenced in the foregoing treatise, all advances made under a future advances deed of trust meeting the conditions provided in G.S. § 45-68 retain the priority of the original security instrument from the recordation date thereof. Subsequent liens, even though recorded or filed prior to certain advances, are junior to all advances under the future advances deed of trust.

Plaintiffs' complaint contained no allegation that defendants' security instruments failed to conform to the requirements of G.S. § 45-68, nor have plaintiffs cited other authority in support of their position. Accordingly, while there may indeed exist a dispute between

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the parties regarding the priority of their respective liens, plaintiffs' complaint reflects "no basis for the [declaratory] relief they seek." *Carter*, 125 N.C. App. at 632, 482 S.E.2d at 11. The trial court therefore did not err in granting defendants' Rule 12(b)(6) motion as to plaintiffs' first cause of action.

[3] Plaintiffs' second cause of action sought monetary damages under a claim of breach of fiduciary duty. In this regard, the complaint alleged CBC

fail[ed] to take reasonable steps to ascertain that the proceeds it advanced to Everlast Builders, Inc. were actually being used for the purpose of constructing improvements on the property. . . .

Plaintiffs' contention was squarely rejected by this Court in *Carlson v. Branch Banking and Trust Co.*, 123 N.C. App. 306, 313, 473 S.E.2d 631, 636 (1996), *disc. review denied*, 345 N.C. 340, 483 S.E.2d 162 (1997).

In *Carlson*, defendant commercial lender extended borrower a loan for the purpose of acquiring a particular business enterprise. *Id.* at 308-11, 473 S.E.2d at 633-34. However, the funds were in fact applied to such items as purchase of an automobile, construction of borrower's home, and expenses of borrower's brokerage company, and borrower ultimately defaulted. *Id.* at 311, 473 S.E.2d at 634-35. At trial, the providers of a letter of credit securing the loan prevailed on a claim of negligence against lender on the basis of evidence tending to show lender maintained no system to ensure loan funds were being applied to their stated purpose. *Id.* at 311-12, 473 S.E.2d at 634. This Court reversed and held lender owed no duty to the third-party guarantor to monitor loan proceeds, absent an express provision in the letter of credit requiring such supervision to ensure loan funds were used for the designated purpose. *Id.* at 315, 473 S.E.2d at 637 (citing *Sunset Investments, Ltd. v. Sargent*, 52 N.C. App. 284, 291, 278 S.E.2d 558, 563, *disc. review denied*, 303 N.C. 550, 281 S.E.2d 401 (1981)) (party providing letter of credit "failed at its peril" to include language in letter restricting honor and payment of the credit).

Under *Carlson*, moreover, plaintiffs' purported reliance on the purpose statement in the loan documents between defendants and Everlast was misguided.

[P]urpose statements are permissive and merely describe what the borrower may do with the money rather than giving rise to a lender's affirmative duty to a third party.

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Id. at 314, 473 S.E.2d at 636. Accordingly, in the absence of allegation of an express contractual provision between the instant parties requiring CBC to ensure application of the loan funds at issue to an agreed purpose, plaintiffs were owed no such legal duty. *See id.* at 315, 473 S.E.2d at 637 (“any duty on the part of a commercial lender to a guarantor to monitor the use of loan proceeds by a borrower, must arise through contract”). The trial court thus did not err in dismissing plaintiffs’ claim of breach of fiduciary duty.

[4] Plaintiffs’ third claim alleged CBC engaged in fraudulent misrepresentation, but included no allegation of plaintiffs’ reasonable reliance thereon. *See Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 91-92, 261 S.E.2d 99, 103 (1980) (to be sufficient, fraud claim must allege certain essential elements including, *inter alia*, “that the plaintiff reasonably relied upon the representation and acted upon it”). Because plaintiffs’ fraud claim failed to plead each element of fraud with particularity, we affirm the trial court’s dismissal of plaintiffs’ third cause of action. *See Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales and Servs.*, 91 N.C. App. 539, 542, 372 S.E.2d 901, 903 (1988) (essential elements of fraud must be pleaded with particularity).

[5] Finally, plaintiffs’ complaint alleged CBC engaged in unfair and deceptive trade practices as proscribed by N.C.G.S. § 75-1.1 (1994). Our Supreme Court has observed that:

A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. . . .
[A] practice is deceptive if it has the capacity or tendency to deceive. . . .

Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) (citation omitted). Suffice it simply to state plaintiffs’ complaint lacked sufficient factual allegations to support such a claim and was properly dismissed by the trial court. *See Wilmoth v. State Farm Mut. Auto. Ins. Co.*, 127 N.C. App. 260, —, 488 S.E.2d 628, 630 (1997) (“pleading may be dismissed under Rule 12(b)(6) if it fails to allege a sufficient . . . factual basis for the claim”).

Affirmed.

Judges LEWIS and SMITH concur.

IN RE APPEAL OF VALLEY PROTEINS, INC.

[128 N.C. App. 151 (1997)]

IN THE MATTER OF: APPEAL OF VALLEY PROTEINS, INC.

No. COA97-219

(Filed 16 December 1997)

Taxation § 27 (NCI4th)—exemption for resource recovery equipment—request on tax listing—failure to file approved form—substantial compliance with statute

A taxpayer's application for an exemption from taxation for recycling and resource recovery equipment was timely filed in substantial compliance with N.C.G.S. § 105-282.1 within the calendar year for which it claimed the exemption, although it was not filed on the approved form, where the taxpayer's listing for the year set forth its intent to claim the exemption and provided the pertinent information; the county received a certification from DEHNR that the taxpayer's property qualified for the exemption; the taxpayer had successfully claimed the exemption for the preceding three years without filing the requisite form; the county for years had recognized the exemption without requiring the filing of a specific form; and there is no evidence that the county was prejudiced by the taxpayer's failure to file the specified form.

Appeal by Anson County from a decision of the Property Tax Commission entered 1 November 1996 by Vice Chairman Terry L. Wheeler. Heard in the Court of Appeals 23 October 1997.

H.P. Taylor, Jr., for Valley Proteins, Inc., taxpayer-appellee.

Poisson, Poisson, Bower & Clodfelter, by George C. Bower, Jr., for Anson County-appellant.

LEWIS, Judge.

The County argues two errors on appeal. We hold that the Property Tax Commission ("the Commission") did not err in granting Valley Protein's ("taxpayer's") property tax exemption for 1994 and therefore we affirm its decision.

Taxpayer is a corporation conducting business in Anson County, North Carolina. Taxpayer produces animal food products from meat and poultry waste products. Taxpayer uses recycling and resource recovery personal property in its business. In 1991, 1992, and 1993, taxpayer applied for and was allowed an exemption for recycling

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and resource recovery (Res Rec) equipment facilities pursuant to N.C. Gen. Stat. section 105-282.1 (1995). In the 1994 tax year, taxpayer listed its taxes, specifying in its listing a value for construction in progress, and stating its estimation of the amount that would qualify for the Res Rec exemption. Taxpayer's listing stated in pertinent part:

As of December 31, 1993, the total amount of construction in progress is \$5,240,478.00. Of this amount, \$430,000 is non RES REC items. Non RES REC consists of:

Concrete Pads	\$ 30,000
Silo	\$100,000
Grease Tanks	\$200,000
Other items	\$100,000

The North Carolina DEHNR will make on site inspection to denote the items that are not RES REC and the ones that are RES REC. As a result of such determination, if DEHNR directs that some of the items deemed RES REC are not RES REC, then taxpayer will take the necessary steps to correct the listing returns.

On 17 August 1994, taxpayer's tax advisor forwarded a letter to the Anson County Tax Office listing the items it claimed to be exempt and stating that they were "being submitted to [the] proper State agency for their inspection and approval." On 20 October 1994, taxpayer left a note at the tax assessor's office stating the date and time that the Department of Environment, Health and Natural Resources ("DEHNR") would inspect the company. On 12 December 1994, DEHNR forwarded a copy of its tax certification to the County tax supervisor stating that it had inspected the taxpayer's resource recovery and recycling facilities and found that they met the requirements of the "Standards for Special Tax Treatment of Recycling and Resource Recovery Equipment and Facilities."

On 12 December 1994, DEHNR mailed the Anson County Tax Assessor a copy of the tax certification for 1994 indicating that taxpayer's property met the requirements for a Res Rec exemption. In February 1995, the Tax Assessor advised the taxpayer that its exemption was denied because it had not filed its exemption on the proper form, form AV-10, "Application for Property Tax Exemption." Taxpayer submitted an application for exemption on the AV-10 form on 6 September 1995 in order to receive a formal decision from which to appeal. The Assessor and two Boards of Commissioners denied the

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application on the grounds that it was not filed within the 1994 tax listing year. Taxpayer appealed to the full Property Tax Commission. The Commission, in a decision entered 1 November 1996, granted taxpayer's property tax exemption.

In its decision, the Commission found as fact that taxpayer met the standards for its requested exemption, that taxpayer had "furnished all pertinent information that [was] required by the AV-10 form in its listing;" that for the years 1991, 1992, and 1993, the County had allowed taxpayer the Res Rec exemption without requiring the taxpayer to file an AV-10 form; and that the County was not prejudiced by taxpayer's failure to file the proper application form. Based upon its findings, the Commission concluded that taxpayer had substantially complied with the law, in applying for the property tax exemption, when it submitted its 1994 tax listing. The County appeals.

The standard of review of decisions of the Property Tax Commission is as follows: the appellate court is to decide all relevant questions of law and interpret constitutional and statutory provisions to determine whether the decision of the Commission is in violation of constitutional provisions; in excess of statutory authority or jurisdiction of the Commission; made upon unlawful proceedings; affected by other errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; or arbitrary and capricious. The court shall review the whole record. *In Re Appeal of Ele, Inc.*, 97 N.C. App. 253, 256, 388 S.E.2d 241, 244 (1990).

The dispositive issue on appeal is whether taxpayer's listing setting forth its intent to claim a Res Rec property tax exemption satisfies the requirements of G.S. 105-282.1. The County argues that because taxpayer did not properly submit its application for exemption on a form AV-10 until September 1995, pursuant to G.S. 105-282.1(a)(5), its exemption only applies to property taxes for the year in which it was filed, and taxpayer may not receive an exemption for tax year 1994.

G.S. 105-282.1(a) provides in part:

Every owner of property claiming exemption or exclusion from property taxes under the provisions of this Subchapter has the burden of establishing that the property is entitled thereto. Except as provided below, an owner claiming exemption or exclusion shall annually file an application for exemption or

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exclusion during the listing period. If the property for which the exemption or exclusion is claimed is appraised by the Department of Revenue, the application shall be filed with the Department. Otherwise, the application shall be filed with the assessor of the county in which the property is situated. *An application must contain a complete and accurate statement of the facts that entitle the property to the exemption or exclusion and must indicate the municipality, if any, in which the property is located. Each application filed with the Department of Revenue or an assessor shall be submitted on a form approved by the Department.* Application forms shall be made available by the assessor and the Department, as appropriate.

(emphasis added).

G.S. § 105-282.1(a)(5) provides:

Upon a showing of good cause by the applicant for failure to make a timely application, an application for exemption or exclusion filed after the close of the listing period may be approved *An untimely application for exemption or exclusion approved under this subdivision applies only to property taxes levied by the county or municipality in the calendar year in which the untimely application is filed.*

(emphasis added).

The County, relying on the provisions above, maintains that taxpayer was required to submit its application for exemption on a "form approved by the Department," and its failure to do so requires that its untimely exemption "appl[y] only to property taxes levied . . . in the year in which the untimely application [was] filed." Apparently, the County urges this Court to interpret "shall be submitted on a form" as a mandatory requirement. "Whether a particular provision in a Statute is regarded as mandatory or directory depends more on the purpose of the statute than upon the particular language used." *Society v. Bridges*, 235 N.C. 125, 130 (1952). We discern the purpose of G.S. § 105-282.1 to be to establish a uniform method of informing a county of a property owner's intent to claim a tax exemption.

In this case, we find, and appellant does not dispute, that the County clearly had notice of taxpayer's intent to claim an exemption, and notice of the particularities of that situation. The County received a detailed listing of the property claimed. The County received certification from DEHNR that taxpayer's property qualified for its

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requested exemption, and the County received this notice in December of 1994. Even if it had used the proper form, taxpayer could not have qualified for the Res Rec exemption without the requisite certification from DEHNR. N.C. Gen. Stat. § 105-275(b) (1995). Moreover, the County knew that any Res Rec exemption must be approved by DEHNR. The County's own testimony was to the effect that, with regard to exemptions filed, "[W]e know that we anticipate a change in the value that's not going to be taxed and the amount to be reduced. We wait for the State to notify us what form is used and the amount of money or value." The interim tax assessor's testimony also revealed that, in general, the businesses in Anson County do not appear to observe the formalities of the statute; instead, they merely "bring something in, whatever the case may be, put somewhere that there might be something there, and then we just go ahead and process all of our listing if everything comes in like it's supposed to."

In conclusion, taxpayer claimed the Res Rec exemption successfully for several years without filing the requisite form; the County for years recognized the exemption without requiring the filing of a specific form; taxpayer notified the County of its intent to claim the exemption in its listing; DEHNR, responsible for approving such claims, did, in fact, approve the exemption and forwarded notice to the County in 1994; and there is no evidence that the County was prejudiced by taxpayer's failure to file the specified form. Taxpayer, based on this particular set of facts, has complied with the purpose of the application requirement of G.S. § 105-282.1 and is entitled to the exemption for the tax year 1994. As our Supreme Court has noted, "[W]here a strict literal interpretation of the language of a statute would contravene the manifest purpose of the Legislature, the reason and the purpose of the law should control, and the strict letter thereof should be disregarded." *Duncan v. Carpenter*, 233 N.C. 422, 426, 64 S.E.2d 410, 413-14 (1951), overruled in part on other grounds by *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980). To hold that taxpayer did not file a property tax exemption application in tax year 1994, based on the facts before us, would contravene the purpose of the statute. The County was clearly aware of taxpayer's intent and received all of the relevant information it needed. We hold that taxpayer's application was timely filed in substantial compliance with the statute within the calendar year for which it claimed the exemption.

The decision of the Commission is affirmed.

STEPHENS v. CITY OF HENDERSONVILLE

[128 N.C. App. 156 (1997)]

Affirmed.

Judges MARTIN, John C., and McGEE concur.

LOTTIE STEPHENS, PLAINTIFF v. CITY OF HENDERSONVILLE, NORTH CAROLINA, A MUNICIPAL CORPORATION; CHRIS A. CARTER, INDIVIDUALLY, IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF DEFENDANT CITY; FRED H. NEIHOFF, JR., INDIVIDUALLY, IN HIS OFFICIAL CAPACITY, AS MAYOR OF DEFENDANT CITY, AND AS AGENT OF DEFENDANT CITY; ROGER BRIGGS, INDIVIDUALLY, IN HIS OFFICIAL CAPACITY AS CITY PLANNER OF DEFENDANT CITY AND AS AGENT OF DEFENDANT CITY; BARBARA VOLK, INDIVIDUALLY, IN HER OFFICIAL CAPACITIES AS MAYOR-PRO-TEM OF DEFENDANT CITY AND COMMISSIONER OF DEFENDANT CITY AND AS AN AGENT OF DEFENDANT CITY AND DIANE CALDWELL, DAN McGRAW AND T. LEE OSBORNE, EACH INDIVIDUALLY, EACH IN OFFICIAL CAPACITY AS COMMISSIONER OF DEFENDANT CITY AND EACH AS AN AGENT OF DEFENDANT CITY, DEFENDANTS

No. COA96-1450

(Filed 16 December 1997)

Constitutional Law § 86 (NCI4th); Municipal Corporations § 37 (NCI4th)— exclusion of property from annexation— failure to show racial discrimination

Plaintiff's forecast of evidence was insufficient to support her claims that the exclusion of her property from annexation into defendant city was based upon intentional racial discrimination in violation of (1) the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983 or (2) Article I, § 19 of the North Carolina Constitution where the evidence showed that other property in the annexed area had existing sewer service but plaintiff's property did not have such service; the evidence showed that it would cost approximately \$20,000 to extend sewer service to plaintiff's property; plaintiff's evidence was insufficient to show that defendants acted with discriminatory intent in applying a \$5,000/one manhole guideline to exclude her property from annexation or that the exclusion of her property was anything more than a decision based on cost/benefit factors; and plaintiff failed to show that defendants made any significant procedural departures in deciding not to annex her property.

STEPHENSONS v. CITY OF HENDERSONVILLE

[128 N.C. App. 156 (1997)]

Appeal by plaintiff from judgment entered 7 October 1996 by Judge Zoro J. Guice, Jr. in Henderson County Superior Court. Heard in the Court of Appeals 25 August 1997.

Michael A. Sheely for plaintiff-appellant.

Frank J. Contrivo, P.A., by Frank J. Contrivo and Andrew J. Santaniello, for defendant-appellee City of Hendersonville.

MCGEE, Judge.

This appeal arises from plaintiff's challenge to the City of Hendersonville's decision to exclude her property from an annexation of certain property in the Blythe Street/Sixth Avenue area (Area 19) in Henderson County. In August 1994, the Hendersonville City Council passed a resolution of intent to annex Area 19. An unimproved portion of plaintiff's property was included in the proposed annexation while an adjacent improved portion of her property was excluded. Plaintiff received notice of the proposed annexation in September 1994 and attended a 6 October 1994 public hearing regarding the annexation at which she asked why some of her property was included when the other portion was not. On 7 October 1994, plaintiff met with defendant Briggs, the City Planner, who told her that all of the properties in Area 19 except hers had sewer service and that it would cost between \$15,000 to \$17,000 to run a sewer line from Blythe Street to her property. When plaintiff mentioned that the unimproved portion of her property included in the proposed annexation did not have a sewer connection, Briggs told her that he might also exclude the unimproved portion from the proposed annexation. He told plaintiff that he would investigate alternative means of providing sewer to her property. Upon investigation, Briggs determined that no feasible alternative means were available and excluded all of plaintiff's property from the proposed annexation.

Plaintiff subsequently wrote letters to Mayor Neihoff and Mayor Pro-Tem Volk in which she protested the exclusion of her property, alleged racial discrimination, petitioned that her property be included, and asked that her petition be placed on the 10 November 1994 City Council meeting agenda. She received replies from defendant Carter and from defendant Volk denying racial motivation for exclusion of her property and stating that the only factor considered was whether or not sewer service could be provided at a reasonable cost. Plaintiff appeared at the 10 November 1994 City Council meet-

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ing and again voiced her objections. The City Council passed the annexation ordinance as proposed thereby excluding plaintiff's property from the Area 19 annexation.

On 8 May 1995, plaintiff filed this action for intentional racial discrimination contending defendants violated her rights pursuant to: (1) the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983, and (2) Article I, § 19 of the North Carolina Constitution. Defendants filed an answer. Subsequently, plaintiff voluntarily dismissed both of her claims against defendant Carter and her claim under the North Carolina Constitution as to defendant Neihoff. Defendants moved for summary judgment which was granted by Judge Zoro Guice, Jr. in Henderson County Superior Court by order entered 7 October 1996. Plaintiff appeals.

Plaintiff contends the trial court erred by granting summary judgment to defendants on her federal and state constitutional claims of intentional racial discrimination. We disagree and affirm the trial court's judgment.

Federal Constitutional Claim

To survive summary judgment on her 42 U.S.C. § 1983 Fourteenth Amendment claim for racial discrimination, plaintiff had to forecast proof of racially discriminatory intent or purpose in the decision not to annex her property. *See Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252, 265, 50 L. Ed. 2d 450, 464 (1977); *Brown v. Town of Davidson*, 113 N.C. App. 553, 555, 439 S.E.2d 206, 207 (1994). Proof of disparate impact, without more, is not sufficient. *Arlington Heights*, *id.* at 264-65, 50 L. Ed. 2d at 464; *Brown*, *id.*

In *Brown*, this Court held that the plaintiffs' evidence of discriminatory intent or purpose in regard to a town's decision to deny a petition to rezone an area from residential to commercial was insufficient as a matter of law. *See Brown*, 113 N.C. App. at 555, 439 S.E.2d at 207. We stated:

In our opinion, the decision to leave a residential area undisturbed, whether it be predominantly black or white, cannot be the basis for a racial discrimination claim when the only evidence directly related to the claim is that similar petitions to rezone were allowed for white-owned businesses on the other end of the street, especially when . . . the areas at the other end of [the street] were primarily open fields before being rezoned.

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Id. at 555-56, 439 S.E.2d at 207. Under the facts presented, we find plaintiff's evidence, like that in *Brown*, insufficient to show discriminatory intent or purpose.

Relying on language in *Arlington Heights*, plaintiff contends that she demonstrated discriminatory intent by producing evidence that a City guideline regarding minor extensions of sewer services was applied to exclude plaintiff's property but was not applied so as to exclude the property of white landowners in other annexed areas. In *Arlington Heights*, the United States Supreme Court observed that substantive and procedural departures from normal application of decision-making factors might be evidence of invidious purpose. See *Arlington Heights*, 429 U.S. at 267, 50 L. Ed. 2d at 465-66. Here, the evidence showed that defendant Briggs, the City Planner, drew the annexation boundary lines based upon the City Council's instructions "to annex those areas presently served by city sewer lines or could be served with minor extensions." In his deposition, defendant Briggs defined "minor extensions" as "to set one more manhole beyond the present reach of a sewer system" or sewer extension work costing approximately \$5000 (\$5000/one manhole guideline). He testified that the estimated cost for extending sewer to plaintiff's property was at first projected to be between \$14,000 to \$17,000 but that later projections put the cost in the \$20,000 range. Consequently, he determined that the extension did not qualify as a minor extension under the guideline and, for this reason, her property was not annexed.

There was evidence showing that sewer was extended when other areas were annexed, each area being described by plaintiff as "not a black residential area." Many of these annexed areas contained several lots and large amounts of acreage so that the total cost per lot and/or per acre of extending sewer was not nearly as high as the projected cost for extending sewer to plaintiff's property. In addition, the lots included in the area from which plaintiff's property was excluded, Area 19, had existing sewer service and thus could be annexed without the expense of adding sewer.

Plaintiff stresses that, at one point, Briggs testified that "the value of the property to be served and the number of people that would be annexed" was factored into the decision of whether sewer should be extended to particular properties, whereas earlier, he had testified that the \$5000/one manhole guideline for minor extensions was "an approximate figure or guideline for any extension *regardless* of the number of people it would serve" (emphasis added). We find this

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variance in his testimony regarding application of the \$5000/one man-hole guideline, by itself, insufficient to show discriminatory intent or purpose. Plaintiff simply has not produced enough evidence to show that the exclusion of her property was anything more than a decision based on cost/benefit factors. The facts and circumstances of the various annexation decisions affecting the other annexed areas are not similar enough to the facts and circumstances regarding the decision excluding plaintiff's property to support the inference that defendants departed substantively from factors typically relied upon by them in making annexation decisions. Plaintiff's evidence is not sufficient to show that defendants acted with discriminatory intent in applying the \$5000/one manhole guideline to her property and in excluding it from the Area 19 annexation.

We are also not persuaded that defendants made any significant procedural departures in deciding not to annex plaintiff's property. The parties dispute whether plaintiff's petition was placed on the agenda of the 10 November 1994 City Council meeting as she had requested. However, she was given opportunity to speak on the matter at that meeting and at an earlier public meeting regarding the annexation. In addition, she was given several opportunities to meet with defendant Briggs and other City officials regarding her concerns and she received replies from City officials in response to her 10 October 1994 letter. We hold plaintiff has not forecast sufficient evidence of procedural departures to support an inference of discriminatory intent or purpose.

State Constitutional Claim

Plaintiff also contends she has forecast sufficient evidence to survive summary judgment on her state constitution racial discrimination claim. We disagree. Our state constitution prohibition against racial discrimination was adopted in 1970 as Article I, § 19. Compare N.C. Const. art. I, § 19 with N.C. Const. art. I, § 17 (1868); see *State v. Cofield*, 320 N.C. 297, 302, 357 S.E.2d 622, 625 (1987). Article I, § 19 of the North Carolina Constitution provides, in pertinent part: "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. Art. I, § 19.

In *Brown*, the plaintiffs sought relief "for violations of state and federal due process and equal protection guarantees." *Brown*, 113 N.C. App. at 554, 439 S.E.2d at 207. Although our discussion focused on federal cases, we upheld the trial court's dismissal of plaintiff's

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action "in its entirety." *See id.* at 554, 556, 439 S.E.2d at 207, 208. We found the plaintiffs' evidence "insufficient as a matter of law to create a question of discriminatory intent or purpose." *Id.* at 555, 439 S.E.2d at 207. For the reasons discussed above in regard to plaintiff's federal racial discrimination claim, we find the evidence presented by plaintiff similar to that presented in *Brown* and hold that summary judgment was properly granted to defendants on plaintiff's state constitution racial discrimination claim.

The trial court's order granting summary judgment to defendants is affirmed.

Affirmed.

Chief Judge ARNOLD and Judge WALKER concur.

ALBERT GREGORY AND WIFE, BETTY GREGORY, PLAINTIFFS v. COUNTY OF HARRETT, AND DAN ANDREWS, WALT TITCHENER, BEATRICE HILL, H.L. SORRELL, JR., AND JOE BOWDEN, HARRETT COUNTY COMMISSIONERS, DEFENDANTS

No. COA97-284

(Filed 16 December 1997)

Zoning § 41 (NCI4th)— rezoning of land—arbitrary and capricious

The approval by county commissioners of an application to rezone plaintiffs' land from a classification allowing manufactured home parks to a classification prohibiting manufactured home parks except on a conditional use basis was arbitrary and capricious and invalid where the application was filed three days after the rejection of an almost identical application; the approval was based primarily on complaints of citizens of an undocumented crime problem allegedly arising from a manufactured home park three-tenths of a mile from plaintiffs' property; and the commissioners did not consider the character of the land, the suitability of the land for the uses permitted in the proposed zoning district, the comprehensive plan, or the existence of changed circumstances justifying the rezoning classification.

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[128 N.C. App. 161 (1997)]

Appeal by defendants from judgment entered 9 December 1996 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 21 October 1997.

Johnson and Johnson, P.A., by W. Glenn Johnson; and Holt & York, LLP, by Eric M. Braun, for plaintiff appellees.

Dwight W. Snow for defendant appellants.

SMITH, Judge.

On 18 July 1988, Harnett County (the County) enacted a comprehensive zoning ordinance applicable to all parts of the County located north of the Cape Fear River. Within this area lies property owned by plaintiffs, consisting of approximately 73.04 acres. According to the zoning ordinance, plaintiffs' property was classified as RA-20M, a classification which allows for the construction and placement of manufactured home parks as a generally permitted use.

In 1989, plaintiffs filed an application with the County Planning Department seeking authorization to expand a manufactured home park located on a portion of their property. The application included a plan for 14 lots, including three lots which had been sited on the property prior to the enactment of the 1988 zoning ordinance. The County granted the requested permit on or about 15 December 1989. Construction of the park began on 8 February 1994, and plaintiffs subsequently paved streets and installed a private water system and water lines on the property. They also installed street "stub-outs" and additional water lines in anticipation of future expansion of the park.

On or about 9 June 1994, Rocky and Michelle Caudle (the Caudles) filed a rezoning application requesting the rezoning of approximately 324 acres, including plaintiffs' property. The Caudles sought to have the zoning of this property changed from RA-20M to RA-30, a classification which expressly prohibits manufactured home parks but allows for manufactured homes on a conditional use basis. This rezoning application was denied by a four-to-one vote of the County Board of Commissioners (the Commissioners) on 15 August 1994.

On 18 August 1994, Tommy and Debra Stephens (the Stephensens) filed an application for rezoning which was virtually identical to the Caudles' application. The Planning Board voted unanimously to recommend to the Commissioners that the application be denied. At

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their regular meeting on 17 October 1994, the Commissioners held a public hearing on the application. At the conclusion of the hearing, a motion was made to approve the application, but the motion died for lack of a second. A motion was then made to table the matter for consideration at a later date, and this motion passed.

Subsequent to this meeting, the Commissioners viewed plaintiffs' property and received additional information and complaints from the parties involved and other individuals living in the area. On 22 December 1994, plaintiffs submitted to the County an application for subdivision approval for the undeveloped portion of their property. However, before processing this application, the Commissioners approved the Stephenses' rezoning application by a three-to-two vote at the regular meeting held on 3 January 1995. The minutes for this meeting reflect that a formal motion to revive consideration of the Stephenses' application was not made prior to the motion to approve and subsequent approval of the application.

Plaintiffs filed this action against the County and each Commissioner (collectively "defendants") on 18 April 1995 alleging the action taken by the Commissioners violated the Commissioners' internal rules of procedure and public policy, and was also arbitrary and capricious. Plaintiffs sought a judgment declaring the action taken by the Commissioners null and void, and also sought a writ of mandamus ordering the County to process and grant their applications for subdivision approval and for a manufactured home park permit. Both parties subsequently moved for summary judgment. The trial court granted plaintiffs' motion for summary judgment on five out of their six causes of action, finding procedural deficiencies in the action taken by the Commissioners which deprived plaintiffs of substantial rights. The trial court declared the alleged rezoning of the property null and void and remanded plaintiffs' applications for subdivision approval and for a manufactured home park permit to the Commissioners for reconsideration in light of its rulings. However, the trial court granted summary judgment in favor of defendants on plaintiffs' inverse condemnation claim.

On appeal, defendants contend the trial court erred by granting summary judgment on the ground that the alleged rezoning of plaintiffs' property was arbitrary and capricious. Defendants argue the trial court should not have substituted its judgment for that of the Commissioners who are charged with the duty of promoting the public health, safety, and welfare of the County's citizens.

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According to N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990), summary judgment is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” The trial court “must consider the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial.” *Briggs v. Rankin*, 127 N.C. App. 477, 479, 491 S.E.2d 234, 236 (1997) (quoting *Snipes v. Jackson*, 69 N.C. App. 64, 72, 316 S.E.2d 657, 661, *disc. review denied and appeal dismissed*, 312 N.C. 85, 321 S.E.2d 899 (1984)).

County commissioners are authorized to rezone property when reasonably necessary to promote the public health, safety, morals, and welfare; however, this authority may not be exercised in an arbitrary or capricious manner. *Rose v. Guilford Co.*, 60 N.C. App. 170, 173, 298 S.E.2d 200, 202 (1982). N.C. Gen. Stat. § 153A-341 (1991) imposes further limitations on the authority of Commissioners to rezone, providing that:

Zoning regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. The regulations shall be made with reasonable consideration as to, among other things, the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the county. In addition, the regulations shall be made with reasonable consideration to expansion and development of any cities within the county, so as to provide for their orderly growth and development.

Any action of a local unit of government that disregards these fundamental zoning concepts may be arbitrary and capricious. *See Allred v. City of Raleigh*, 277 N.C. 530, 545, 178 S.E.2d 432, 440 (1971).

Here, the Commissioners approved a rezoning application filed three days after the rejection of an almost identical rezoning request. It is evident from reviewing the record that the three Commissioners

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who voted to approve the Stephenses' rezoning application based their approval primarily on complaints by various citizens of an undocumented crime problem allegedly arising from a manufactured home park three-tenths of a mile from plaintiffs' property. One Commissioner stated he voted to rezone plaintiffs' property because he did not think a manufactured home park "was in keeping with the . . . neighborhood," and another simply stated, "based on my information, I just did what I thought was best for Harnett County." There is also evidence in the record that at least one Commissioner stated the alleged crime problem was the result of the type of people who live in manufactured home parks.

On the other hand, there is no evidence in the record showing that the Commissioners considered the character of the land, the suitability of the land for the uses permitted in the proposed zoning district, the comprehensive plan, or the existence of changed circumstances justifying the rezoning application. By approving the rezoning application without considering such factors, the Commissioners acted arbitrarily and capriciously. *See Rose*, 60 N.C. App. at 174, 298 S.E.2d at 203 (reversing summary judgment for county commissioners and holding that the commissioners' action of rezoning plaintiffs' property to prevent the location of additional manufactured homes on the property was arbitrary and capricious in the absence of changed circumstances justifying the rezoning); *In re Application of Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77, 81 (1970) (holding that the action of the county commissioners denying an application for a permit to establish a mobile home park as a special exception was arbitrary and capricious where all ordinance requirements were met and stating that the commissioners could not deny a permit "solely because, in their view, a mobile-home park would 'adversely affect the public interest[]'; *Chernick v. McGowan*, 656 N.Y.S.2d 392, 394, *leave to appeal granted*, 90 N.Y.2d 806 (1997) (holding that, "[w]hile the Town Board is free to consider matters relating to the public welfare in determining whether to grant or deny a special exception or permit . . . it is impermissible to base the denial solely on the generalized objections and concerns of neighboring community members"). Thus, the trial court properly granted summary judgment for plaintiffs.

Because we find the Commissioners acted arbitrarily and capriciously in approving the rezoning application, we need not address defendants' remaining assignments of error.

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[128 N.C. App. 166 (1997)]

Affirmed.

Judges WYNN and WALKER concur.

VERONICA A. HASTINGS, GUARDIAN AD LITEM FOR MARQUITA PRATT, PLAINTIFF-APPELLANT v. THE SEEGARS FENCE COMPANY, DEFENDANT-APPELLEE

No. COA96-1387

(Filed 16 December 1997)

1. Courts § 84 (NCI4th)— denial of summary judgment—second motion—same issue—preclusion of entry by second judge

In an action to recover for personal injuries received by the minor plaintiff while playing on a gate constructed by defendant on school grounds, a superior court judge's denial of defendant's motion for summary judgment precluded a second judge from thereafter entering summary judgment in favor of defendant, although the second judge considered depositions which had not been before the first judge, where the legal issues raised by the pleadings remained the same; the allegation in defendant's answer prior to the first motion that the minor plaintiff was contributorily negligent by engaging in horseplay on the gate was sufficient to raise the N.C.G.S. § 99B-3 defense relied upon by defendant as the basis for its second motion that the minor plaintiff used the gate in a manner for which it was not designed or intended; the issue of the manner in which the minor plaintiff used the gate was thus before the first judge; and the first judge's denial of summary judgment was conclusive upon the issue.

2. Products Liability § 21 (NCI4th)— minor plaintiff—injury on gate—use in manner not intended—summary judgment improper

In an action to recover for personal injuries (crushed fingers) received by the eight-year-old plaintiff while playing on a gate constructed by defendant on school grounds, summary judgment was improperly entered for defendant on the ground that the minor plaintiff used the gate in a manner for which it was not designed or intended, N.C.G.S. § 99B-3, since issues of foreseeability and proximate cause were for the jury to determine.

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[128 N.C. App. 166 (1997)]

Appeal by plaintiff from order entered 29 July 1996 by Judge W. Russell Duke, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 9 September 1997.

McLawhorn & Associates, by Charles L. McLawhorn, Jr., and Robert Marc Rubin, for plaintiff-appellant.

Barber & Associates, P.A., by Timothy C. Barber and Andrew H. D. Wilson, for defendant-appellee.

MARTIN, John C., Judge.

Plaintiff, who is the mother of and guardian *ad litem* for the minor plaintiff, brought this action against defendant Seegars Fence Company and the Pitt County School Board to recover compensatory and punitive damages for personal injuries to the minor plaintiff and for emotional distress to both plaintiff and the minor plaintiff allegedly caused by negligence and gross negligence on the part of defendants. The injuries were alleged to have occurred on 15 May 1993 when the minor plaintiff, an eight-year-old child, was playing on a fence and gate constructed by defendant Seegars on school grounds belonging to the Pitt County School Board. Plaintiff subsequently submitted to a voluntary dismissal of her claims against the Pitt County School Board. Defendant Seegars answered, denying plaintiff's allegations of negligence and alleging the child's contributory negligence as a bar to plaintiff's recovery. After discovery, defendant Seegars moved for summary judgment.

Defendant's motion for summary judgment was heard by Judge James E. Ragan, III, at the 25 September 1995 civil session of the Pitt County Superior Court. The pleadings, affidavits, and discovery materials before Judge Ragan tended to show, in summary, that in November 1990 defendant Seegars installed a fence and gates at the playground of the Third Street School in Greenville, N.C. One of the gates was a twenty-foot horizontal cantilevered gate attached to rollers on the top and bottom; the gate is moved horizontally along the rollers to open and close the fence. On 15 May 1993, the minor plaintiff was playing on the gate. While she was hanging onto the top of the gate, another child pushed on it causing it to roll. Two of the minor plaintiff's fingers became caught in the gate roller, crushing them and resulting in their amputation. Plaintiff's expert witness stated by affidavit that it was his opinion that the gate mechanism was defective and unreasonably dangerous in that it had no guard device over the roller mechanism. By order dated 25 October 1995,

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Judge Ragan granted defendant Seegars' motion for summary judgment as to plaintiff's claims for infliction of emotional distress, but denied summary judgment with respect to the minor plaintiff's claims for damages for personal injuries.

On 11 June 1996, after additional discovery, defendant Seegars filed motions to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(6), for judgment on the pleadings pursuant to 12(c), and for summary judgment pursuant to G.S. § 1A-1, Rule 56. These motions were heard at the 8 July 1996 civil session of the Pitt County Superior Court by Judge W. Russell Duke, Jr. In an order dated 29 July 1996, Judge Duke concluded "that there exists an independent basis to allow each of Defendant's motions, . . .", granted each of the motions, and dismissed plaintiff's action. Plaintiff gave timely notice of appeal from Judge Duke's order.

[1] The primary issue is whether Judge Ragan's 25 October 1995 order denying defendant's motion for summary judgment as to the minor plaintiff's claim for personal injury precluded Judge Duke from granting defendant's subsequent motion and dismissing the action. We hold that it did, and reverse.

Initially we note that although defendant ostensibly filed its second motion pursuant to Rules 12(b)(6) and 12(c), and alternatively pursuant to Rule 56, Judge Duke's order explicitly states that he considered depositions and other matters in addition to the pleadings. Therefore, notwithstanding Judge Duke's assertion of "an independent basis to allow each of Defendant's motions . . .", the disposition of the motion, and our review thereof, is as provided solely by Rule 56. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1967); N.C. Gen. Stat. § 1A-1, Rule 12(c) (1967).

The general rule is well-established that one trial judge "may not reconsider and grant a motion for summary judgment previously denied by another judge." *Iverson v. TM One, Inc.*, 92 N.C. App. 161, 164, 374 S.E.2d 160, 163 (1988) (quoting *Smithwick v. Crutchfield*, 87 N.C. App. 374, 361 S.E.2d 111 (1987)); *Asheville Contracting Co. v. City of Wilson*, 62 N.C. App. 329, 303 S.E.2d 365 (1983); *Biddix v. Construction Corp.*, 32 N.C. App. 120, 230 S.E.2d 796 (1977). A second motion for summary judgment may be considered by the trial court only when it presents legal issues different from those raised in the earlier motion. *Asheville Contracting Co.*, *supra*; *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 272 S.E.2d 374 (1980), *disc.*

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review denied, 302 N.C. 217, 276 S.E.2d 914 (1981). In the present case, defendant argues that its second motion was based upon the defense contained in G.S. § 99B-3, which had not been before the court at the time of the previous hearing. We do not agree, notwithstanding the recitation in Judge Duke's order that "G.S. 99B-3 has not been the subject of a previous motion"

Although the materials before Judge Duke at the hearing on defendant's second motion included depositions which had not been before Judge Ragan when he denied defendant's first motion for summary judgment, the legal issues raised by the pleadings remained the same. Defendant's amended answer, which had been filed prior to the initial summary judgment motion and had not since been further amended, alleged the minor plaintiff's contributory negligence "by engaging in horseplay on the fence and cantilevered gate" This pleading was sufficient to raise the defense provided by G.S. § 99B-3, upon which defendant based its second motion, that the minor plaintiff "used the fence in a manner other than as it was originally designed, tested, or intended by the manufacturer to be used, i.e. she played on the fence and used it as a toy." The depositions offered at the hearing on the second motion disclosed, as had been disclosed in the pleadings and in the materials considered by Judge Ragan in ruling on defendant's first motion for summary judgment, that the minor plaintiff had been injured while playing on the gate. Thus, the issue of the manner in which the minor plaintiff used the fence and gate was before Judge Ragan at the hearing of defendant's first motion for summary judgment and his denial of summary judgment was conclusive upon the issue, precluding Judge Duke from thereafter granting summary judgment on that same issue.

[2] Moreover, even if defendant's second motion had been properly before Judge Duke for decision, summary judgment in this case was error. G.S. § 99B-3 provides, in pertinent part:

Alteration or modification of product.

(a) No manufacturer or seller of a product shall be held liable in any product liability action where a **proximate cause** of the personal injury, . . . was either an alteration or modification of the product by a party other than the manufacturer,

. . .

(b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or **use** of the

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product from that **originally** designed, tested, or **intended** by the manufacturer. . . .

N.C. Gen. Stat. § 99B-3 (emphasis added). Thus, in order for G.S. § 99B-3 to bar plaintiff's recovery, the minor plaintiff's misuse of the fence and gate must have been a proximate cause of her injury. *See Rich v. Shaw*, 98 N.C. App. 489, 391 S.E.2d 220, *disc. review denied*, 327 N.C. 432, 395 S.E.2d 689 (1990).

Foreseeability of some injurious consequence of one's act is an essential element of proximate cause, though anticipation of the particular consequence is not required. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). While the usual test is whether "a person of ordinary prudence could have reasonably foreseen . . ." some injurious result from the unintended use of the product, *id.* at 107, 176 S.E.2d at 169; where, as in the present case, the actions of a minor child are at issue, the test of foreseeability is whether a child of similar "age, capacity, discretion, knowledge, and experience" could have foreseen some injurious result from his or her use of the product. *See Hoots v. Beeson*, 272 N.C. 644, 159 S.E.2d 16 (1968) (standard of care applicable to minor between ages of 7 and 14 years). Issues of proximate cause and foreseeability, involving application of standards of conduct, are ordinarily best left for resolution by a jury under appropriate instructions from the court. *See Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). We hold this rule especially applicable where the conduct of a minor child is at issue.

Summary judgment is reversed and this case is remanded to the trial court for further proceedings consistent with this opinion.

Reversed and Remanded.

Judges EAGLES and TIMMONS-GOODSON concur.

JEFFREYS v. SNAPPY CAR RENTAL

[128 N.C. App. 171 (1997)]

ETHEL JEFFREYS, PLAINTIFF V. SNAPPY CAR RENTAL, INC. AND CHRISTOPHER TODD BASINGER, DEFENDANTS V. ATLANTIC INDEMNITY COMPANY, ADDITIONAL DEFENDANT BY CROSS-CLAIM

No. COA96-849

(Filed 16 December 1997)

Insurance § 584 (NCI4th)— car rental—self-insured lessor—liability insurance—provision by lessor not required

A car rental company, which was a certified self-insured leasing company, was not obligated by N.C.G.S. § 20-281 to provide \$25,000 of primary liability coverage to a lessee for an accident that occurred while the lessee was driving the rental vehicle where the lessee had a valid liability policy for the minimum amount required by the Financial Responsibility Act, and the car rental agreement specifically excluded liability insurance coverage.

Appeal by cross-claim defendants from order entered 29 March 1996 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 1 April 1997.

Womble Carlyle Sandridge & Rice, A Professional Limited Liability Company, by R. Anthony Hartsoe, for defendant-appellee Snappy Car Rental, Inc.

Walter L. Horton, Jr., and David K. Williams, Jr., for cross-claim defendants-appellants Christopher Todd Basinger and Atlantic Indemnity Company.

TIMMONS-GOODSON, Judge.

Defendant Christopher Todd Basinger (“Basinger”) operated a motor vehicle owned by defendant Snappy Car Rental, Inc. (“Snappy”) on 3 April 1995, when he collided with a vehicle operated by plaintiff Ethel Jeffreys. Plaintiff filed an action against Basinger and Snappy to recover damages resulting from the collision. At the time of the accident, Snappy was a certified self-insured vehicle leasing company under the North Carolina Motor Vehicle Safety and Financial Responsibility Act of 1953 (“The Financial Responsibility Act”) and the Vehicle Responsibility Act of 1957. In addition, Basinger had a valid liability insurance policy of \$25,000.00 in effect with Atlantic Indemnity Company (“Atlantic”).

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After plaintiff's action was commenced, Snappy filed a cross-claim naming Atlantic as an additional defendant. By its cross-claim, Snappy sought a declaratory judgment determining the rights and liabilities of Snappy and Atlantic as to primary liability coverage in the context of plaintiff's suit against Basinger. Snappy claimed that it had no duty to defend Basinger or to pay any portion of a judgment that plaintiff might obtain against him, because Atlantic furnished primary coverage. Atlantic, on the other hand, denied primary coverage and maintained that as a certified self-insurer under North Carolina General Statutes section 20-281, Snappy was obligated to provide \$25,000.00 of primary liability coverage to its lessee, Basinger. Upon cross-motions for summary judgment, the trial court entered judgment in favor of Snappy and against Basinger and Atlantic. Basinger and Atlantic appeal.

On appeal, Basinger and Atlantic argue that the trial court erred in awarding summary judgment to Snappy. They contend that notwithstanding the terms of the lease agreement, North Carolina General Statutes section 20-281 compelled Snappy, as a self-insured leasing company, to provide primary indemnity coverage to Basinger. We disagree.

Section 20-281 of the General Statutes provides, in pertinent part:

[I]t shall be unlawful for any person, firm or corporation to engage in the business of renting or leasing motor vehicles to the public for operation by the rentee or lessee unless such person, firm or corporation has secured insurance for his own liability and that of his rentee or lessee[.]

N.C. Gen. Stat. § 20-281 (1993). Section 20-281 accommodates North Carolina General Statues section 20-279.21, which is part of the Financial Responsibility Act and is generally applicable to all automobile owners. *See American Tours, Inc. v. Liberty Mutual Ins. Co.*, 315 N.C. 341, 338 S.E.2d 92 (1986); N.C. Gen. Stat. § 20-279.21 (Cum. Supp. 1996). The primary purpose of compulsory automobile liability insurance, as mandated by the Financial Responsibility Act, is to compensate innocent victims who have been injured by financially irresponsible motorists. *Insurance Co. v. Insurance Co.*, 23 N.C. App. 715, 717, 209 S.E.2d 552, 553 (1974), cert. denied, 286 N.C. 415, 211 S.E.2d 801 (1975); *see also Insurance Co. v. Casualty Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973). To that end, "an insurer by the terms of its policy [can] exclude liability coverage under a[n] . . . owner's policy if

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the driver of a vehicle . . . [is] covered under his own liability policy for the minimum amount of liability coverage required by the Motor Vehicle Financial Responsibility Act, N.C.G.S. § 20-279.1 *et seq.*" *United Services Auto. Assn. v. Universal Underwriters Ins. Co.*, 332 N.C. 333, 334, 420 S.E.2d 155, 156 (1992).

Atlantic urges this Court to regard *Southern Home Insurance Company v. Burdette's Leasing Service, Inc.*, 268 S.C. 472, 234 S.E.2d 870 (1977), a South Carolina case, as controlling authority on the issue of primary coverage. We decline to do so, as abundant North Carolina case law exists addressing the issues involved in this action. Indeed, regarding the Financial Responsibility Act's mandate that automobile owners carry liability insurance, our Supreme Court has "held that this statute is satisfied if the terms of the policy exclude coverage in the event the driver of a vehicle is covered under some other policy for the minimum amount of liability coverage required by law." *Integon Indemnity Corp. v. Universal Underwriters Ins. Co.*, 342 N.C. 166, 169, 463 S.E.2d 389, 391 (1995) (citing *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 352, 152 S.E.2d 436, 444-45 (1967)).

In the case *sub judice*, Basinger had a valid \$25,000.00 liability insurance policy with Atlantic, when he executed the vehicle lease agreement with Snappy. The lease agreement expressly denied liability coverage, stating in bold, conspicuous, capital letters: "NO LIABILITY INSURANCE PROVIDED BY SNAPPY." Likewise, Basinger agreed to indemnify and hold Snappy harmless against all claims and liabilities arising out of Basinger's use of the rental car. Thus, as Basinger had an operative liability insurance policy meeting the requirements of the Financial Responsibility Act, and as Snappy specifically excluded liability insurance in the lease agreement, Snappy owes Basinger no liability coverage. This argument, therefore, fails.

Atlantic further argues that paragraph 7C of the rental agreement specifically states Snappy's intent to furnish primary liability coverage in this matter. Section 7C, entitled "Liability, Indemnification and Insurance" reads pertinently, as follows:

If You [Snappy] are required by law to provide automobile liability . . . insurance coverage, the limits will be the minimum required by the financial responsibility law of the jurisdiction in which I [Basinger] signed this Agreement. If You [Snappy] are required to provide such coverage, then I [Basinger] and all

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Authorized Renters will defend, indemnify and hold You [Snappy] harmless from and against any loss, liability and expense in excess of the limits of protection that You [Snappy] so provide.

Notwithstanding Atlantic's contention, this section, read in context with section 7A of the rental agreement, addresses the situation where, unlike here, the lessee lacks personal liability coverage. Section 7A states:

I represent to You [Snappy] that I [Basinger] have a valid policy of automobile liability insurance in force for bodily injury or death of another, and for property damage. You are relying upon my representation about my automobile insurance, and You are not providing automobile liability insurance, or any other form of insurance covering the Car, to Me or to any other person using or riding in the Car while it is on rent to Me.

The lease agreement plainly denied indemnity coverage for Basinger, since he had an effective liability insurance policy with Atlantic. Therefore, this argument too must fail.

For the reasons stated herein, the trial court's order granting summary judgment to Snappy is affirmed.

Affirmed.

Judges GREENE and WYNN concur.

CAROLYN F. BURNETT, PLAINTIFF v. WARREN H. WHEELER, DEFENDANT

No. COA97-332

(Filed 16 December 1997)

1. Divorce and Separation § 402 (NCI4th)— child support—parent's income—sufficiency of findings

An order requiring defendant to pay \$900 per month in child support was remanded where defendant had been an airline pilot with an income of \$150,000; his child support was \$950 per month; he filed a motion to modify the payment due to a substantial change in income in that he had retired, was self-employed, and had an income of \$29,000 per year after business

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losses; and the court found that defendant had suffered a Sub-Chapter S pass through onto his personal tax return in excess of \$52,000 and that defendant either had earnings or an earnings capacity of at least \$77,000 per year. It could not be determined whether defendant's income was \$77,000 with the loss or if the court chose not to find the loss credible at all.

2. Divorce and Separation § 405 (NCI4th)— child support—parent's income—all sources

The trial court did not abuse its discretion in a child support matter in its calculation of defendant's income where defendant contended that the court incorrectly imputed to him an income of \$77,000 per year despite evidence of an actual income of \$29,000 and without any finding that he had deliberately depressed his income. A careful review of the record reveals that the court found that defendant's total income from all available sources equaled at least \$77,000, including retirement accounts, stocks, and land, despite an ambiguous finding regarding business losses. It is appropriate to consider all sources of income along with defendant's earning capacity when determining defendant's gross income and setting child support.

Appeal by defendant from order entered 25 October 1996 by Judge Thomas G. Foster, Jr. in Guilford County District Court. Heard in the Court of Appeals 19 November 1997.

Hatfield and Hatfield, by Kathyrn K. Hatfield, for plaintiff-appellee.

Thigpen, Blue, Stephens and Fellers, by T. Byron Smith, for defendant-appellant.

LEWIS, Judge.

Defendant appeals the order of the trial court on the grounds that the court did not apply the North Carolina Child Support Guidelines correctly. We affirm in part and remand in part for further findings.

Pursuant to a child support order entered 20 August 1990, defendant paid \$950.00 per month to plaintiff Carolyn Burnett for the support of their minor child. The order was based upon an income of \$150,000 defendant earned as a pilot with U.S. Air Airlines. In July 1995, defendant filed a motion to modify his child support payment in accordance with the North Carolina Child Support Guidelines ("the

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Guidelines") due to a substantial change in income. Defendant retired from U.S. Air and was self-employed. He reported his income as approximately \$29,000 per year after business losses. On 16 October 1996, the matter was heard before Judge Thomas G. Foster, Jr. The trial court found that "the defendant has either earnings or an earning capacity of at least \$77,000 per year." As a result, the court ordered defendant to pay child support of \$900 per month in accordance with the Guidelines. Defendant appeals.

[1] First, defendant contends that the trial court failed to accurately apply the Child Support Guidelines in determining his income. Defendant contends that the trial court incorrectly computed his gross income under the Guidelines by failing to deduct business losses.

Pursuant to the Guidelines, gross income from self-employment or operation of a business is defined as "gross receipts minus ordinary and necessary expenses required for self-employment or business operation." *See North Carolina Child Support Guidelines*. The trial court found that defendant suffered a loss in excess of \$52,000. Defendant contends that the trial court was required to factor this loss into its computation of his gross income. However, from our review of the record, it is unclear whether the trial court deducted the loss from defendant's income. In its findings of fact, the trial court stated, "His company, WRA, Inc. showed a Sub-Chapter S pass through loss onto his personal tax return in excess of \$52,000." There are no further findings indicating how the trial court treated this loss. We are unable to determine if the trial court concluded that even with a \$52,000 loss the defendant's income was \$77,000, or if the trial court chose not to find the loss credible at all and therefore did not factor it into its computation.

In orders of child support, the trial court should make findings specific enough to indicate to the appellate court that due regard was taken of the requisite factors. *See Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). Because we are unable to determine what the trial court decided relative to the evidence of loss submitted by defendant, we remand for more specific findings indicating the trial court's treatment of the \$52,000 loss and its computation of defendant's gross income.

[2] Next, defendant assigns error to the trial court's conclusion that he has an earning capacity of at least \$77,000 per year. Defendant contends that the trial court "imputed" an income to him of \$77,000

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despite evidence of his actual income, which he maintains is \$29,000, and without any finding that defendant has deliberately depressed his income in order to evade his child support responsibility. We disagree.

The amount of child support awarded is in the discretion of the trial judge and will be disturbed only upon a showing of abuse of that discretion. *Dixon v. Dixon*, 67 N.C. App. 73, 74, 312 S.E.2d 669, 670 (1984). Defendant is correct in his contention that a person's capacity to earn income may be the basis of an award only if there is a finding that the party deliberately depressed his income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child. *Goodhouse v. DeFravio*, 57 N.C. App. 124, 127, 290 S.E.2d 751, 753 (1982). However, we find that defendant mischaracterizes Judge Foster's order. Judge Foster did not "impute" an income of \$77,000 to defendant. A careful review of the record reveals that the trial court found that defendant's total income, from all available sources, equaled at least \$77,000. When setting child support and determining the defendant's gross income, it is appropriate to consider all sources of income along with the defendant's earning capacity. See *North Carolina Child Support Guidelines*. The trial court found as fact that defendant had retirement accounts which totaled \$722,384 and that he had stocks and land valued at \$60,000 and \$74,000, respectively. Thus, notwithstanding the court's ambiguous treatment of the \$52,000 loss discussed *supra*, the trial court did not abuse its discretion in considering all of defendant's available sources of income in arriving at his gross income. We find that the trial court did not impute an income to defendant and therefore overrule this assignment of error.

Affirmed in part and reversed and remanded in part.

Judges WALKER and TIMMONS-GOODSON concur.

WEATHERFORD v. KEENAN

[128 N.C. App. 178 (1997)]

ANNA C. WEATHERFORD (FORMERLY KEENAN), PLAINTIFF V.
LARRY S. KEENAN, DEFENDANT

No. COA97-270

(Filed 16 December 1997)

Trusts and Trustees § 152 (NCI4th)—equitable distribution—marital home—improvements—constructive trust

The trial court did not improperly impose a constructive trust on improvements to the marital home in an equitable distribution action. Although defendant suggests that it was improper for the trial court to make findings regarding a constructive trust and unjust enrichment when neither cause was pled, a constructive trust is a remedy within the court's equitable powers rather than a cause of action. A claimant may expressly sue to establish a constructive trust, but that is not necessary for the court to do equity. The court's reference to unjust enrichment was an explanation for why it impressed a constructive trust, as it was entitled to do in an equitable distribution action, rather than an adjudication of an unjust enrichment claim.

Appeal by defendant from judgment entered 6 December 1996 by Judge Earl J. Fowler, Jr. in Buncombe County District Court. Heard in the Court of Appeals 19 November 1997.

Ingrid Friesen, for plaintiff-appellee.

Eleanor McCorkle, for defendant-appellant.

LEWIS, Judge.

Defendant challenges that portion of the trial court's equitable distribution judgment which impresses a constructive trust upon improvements to the home where he and plaintiff lived before separating. We affirm.

Plaintiff and defendant were married in 1968. In 1970 they moved into a garage apartment on land owned by defendant's parents. They did not pay rent. Beginning in 1983, plaintiff and defendant made a series of improvements to the property. The trial court found that when the parties separated in 1990, the improvements valued \$23,665.00. Sometime after separation and before divorce, defendant inherited the improved property.

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The trial court found that the improvements had been financed with marital funds, and it was therefore equitable to create a constructive trust for plaintiff of one-half the net value of the improvements on the date of separation. The trial court concluded that the increase in value to the property attributable to the improvements was marital property, even though the property was owned by defendant's parents at all times prior to the date of separation. The trial court stated that to hold otherwise would unjustly enrich the defendant. Judgment was entered distributing marital property in conformity with these conclusions.

Defendant argues that it was improper for the trial court to make findings regarding a constructive trust and unjust enrichment when neither cause of action was pled.

Defendant errs when he suggests that a constructive trust is a cause of action rather than a remedy. When a court impresses a constructive trust upon property for the benefit of a claimant, it exercises its equitable powers to fashion remedies. *See Roper v. Edwards*, 323 N.C. 461, 465, 373 S.E.2d 423, 425 (1988) ("On the whole . . . the constructive trust is seen by American courts today as a remedial device, to be used *wherever specific restitution in equity is appropriate on the facts.*" (quoting D. Dobbs, *Remedies* § 4.3 (1973))). It is true that a claimant may expressly sue to establish a constructive trust, based on a legal theory justifying its creation. It is not necessary, however, for a claimant to expressly seek the creation of a constructive trust for a court to do equity.

A constructive trust is merely a procedural device by which a court of equity may rectify certain wrongs. It is suggestive of a power which a court of equity may exercise in an appropriate case, but it is not a designation of the cause of action which justifies an exercise of the power.

New Amsterdam Casualty Company v. Waller, 301 F.2d 839, 842 (4th Cir. 1962). The trial court was entitled to create a constructive trust even though plaintiff did not expressly request such relief in her complaint for equitable distribution.

Defendant also errs when he suggests that the trial court adjudicated an unpled claim of unjust enrichment. Defendant bases this argument on the trial court's statement that it created a constructive trust to avoid "unjustly enrich[ing] the defendant."

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[128 N.C. App. 180 (1997)]

Our equitable distribution statute empowers the trial court to distribute "marital property," which includes both legal and equitable interests in property. N.C. Gen. Stat. § 50-20 (1995); *Upchurch v. Upchurch*, 122 N.C. App. 172, 175, 468 S.E.2d 61, 63, *disc. review denied*, 343 N.C. 517, 472 S.E.2d 26 (1996). In an action for equitable distribution, the trial court is entitled to create a constructive trust in order to recognize equitable interests in property acquired before separation. *Id.* A constructive trust may be imposed to prevent the unjust enrichment of the holder of legal title to property. *Wilson v. Development Co.*, 276 N.C. 198, 211, 171 S.E.2d 873, 882 (1970). The trial court's reference to "unjust enrichment" was an explanation for why it impressed a constructive trust on the improvements to the home, as it was entitled to do. It was not an adjudication of an unjust enrichment claim.

Defendant also asserts that the trial court lacked the authority to impose a constructive trust on the home improvements in this equitable distribution case. We overrule this assignment of error for the reasons stated above.

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.



JOHN ANDERSON TAYLOR, JR., PLAINTIFF v. DULCIA G. TAYLOR, DEFENDANT

No. COA97-173

(Filed 16 December 1997)

Interest and Usury § 5 (NCI4th)— child support—prejudgment interest

The trial judge may award interest on child support accruing on the date the complaint was filed.

Appeal by plaintiff John Anderson Taylor, Jr. from a child support order entered by Judge Chester C. Davis on 16 October 1996. Heard in the Court of Appeals 17 November 1997.

Plaintiff and defendant, Dulcia G. Taylor, were divorced 18 July 1991, after almost ten years of marriage. During their marriage, the

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couple had two children: John Anderson Taylor, III who was born on 27 April 1983, and Ashton Ross Taylor who was born on 10 July 1986. After plaintiff father filed for divorce on 10 May 1991, defendant mother filed an answer and counterclaim seeking custody of the children and child support substantially in excess of the North Carolina Guidelines.

The trial court initially entered a child support order in Forsyth County District Court on 23 January 1994. Following appeals to this Court and the North Carolina Supreme Court, the case was remanded. *See Taylor v. Taylor*, 118 N.C. App. 356, 455 S.E.2d 442, *review granted in part, denied in part*, 340 N.C. 572, 460 S.E.2d 330 (1995), *rev'd* 343 N.C. 50, 468 S.E.2d 33 (1996).

Edward P. Hausle, P.A., by Edward P. Hausle for plaintiff.

Robinson & Lawing, L.L.P., by Norwood Robinson and C. Ray Grantham, Jr., for defendant.

ARNOLD, Chief Judge.

On appeal from a child support order, “[a]bsent a clear abuse of discretion, a judge’s determination of what is a proper amount of support will not be disturbed on appeal.” *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985). To disturb the trial court’s calculation of appropriate child support, an appellant must establish that the trial judge’s ruling is “manifestly unsupported by reason.” *Id.*, quoting *Clark v. Clark*, 301 N.C. 123, 128-29, 271 S.E.2d 58, 63 (1980).

The significant issue in this appeal is whether the trial judge may award interest on an award of child support, accruing monthly on the total amount of unpaid support from the filing of the complaint. Plaintiff contends that there is no statutory authorization for an award of pre-judgment interest in a child support case. While recognizing that pre-judgment interest is authorized under N.C. Gen. Stat. § 24-5 in contract actions, and in non-contract actions when the damages are compensatory in nature, plaintiff argues that this statute is not applicable to an award of child support. *See N.C. Gen. Stat. § 24-5 (1991)*. Plaintiff relies on equitable distribution cases, involving property distribution rather than support, to support his argument that the trial court was unauthorized to award interest in a child support action. *Appelbe v. Appelbe*, 76 N.C. App. 391, 333 S.E.2d 312 (1985) (no statutory authorization for the payment of prejudgment interest on an equitable distribution). He additionally seeks to distin-

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guish this case from others in which awards of interest on arrearages were upheld.

We find plaintiff's argument unpersuasive. Under North Carolina law, past due child support payments vest when they accrue. *N.C. Gen. Stat. § 50-13.10(a)* (1995). Allowing plaintiff to defer payment for years of his obligations ensuing from the date of the filing of the complaint, without paying interest on the award, would effectively grant him an interest-free loan from his ex-wife. When determining a child support award, a trial judge has a high level of discretion, not only in setting the amount of the award, but also in establishing an appropriate remedy. *Moore v. Moore*, 35 N.C. App. 748, 751, 242 S.E.2d 642, 644 (1978). This discretion has been expanded in recent years due to the broad language of N.C. Gen. Stat. § 50-13.4. See *Griffin v. Griffin*, 103 N.C. App. 65, 404 S.E.2d 478 (1991). The North Carolina Supreme Court, moreover, upheld an award including interest when a defendant failed to meet his child support obligations under the parties' separation and modification agreements. *Bromhal v. Stott*, 341 N.C. 702, 703, 462 S.E.2d 219, 220 (1995). This Court also recognized the broad scope of remedies available to a trial judge in a child support case and upheld an award including interest "from the date defendant filed the motion to have the arrearages reduced to judgment." *Griffin*, 103 N.C. App. at 67, 404 S.E.2d at 479. We hold, accordingly, that interest may be awarded on child support accruing on the date the complaint is filed.

Upon review of plaintiff's remaining assignments of error, we find no prejudicial error.

Affirmed.

Judges GREENE and McGEE concur.

LEWIS v. LEWIS

[128 N.C. App. 183 (1997)]

BRENDA J. LEWIS, PLAINTIFF v. RONALD WAYNE LEWIS, DEFENDANT

No. COA97-296

(Filed 16 December 1997)

Appeal and Error § 177 (NCI4th)— appeal from adultery verdict—alimony judgment during pendency of appeal—no jurisdiction

The trial court lacked jurisdiction to enter judgment on an alimony obligation during pendency of an appeal of a jury determination of adultery. When an appeal is perfected, it stays all further proceedings in the court below upon the matter embraced therein. N.C.G.S. § 1-294.

Appeal by defendant from judgment entered 12 November by Judge L. Oliver Noble, Jr., 1996 in Catawba County District Court. Heard in the Court of Appeals 28 October 1997.

Wilson, Palmer & Lackey, P.A., by W.C. Palmer and Timothy J. Rohr, for defendant-appellant.

Martha E. Fox for plaintiff-appellee.

WYNN, Judge.

N.C. Gen. Stat. § 1-294 (1996) provides “[w]hen an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein.” Because the trial court in this case entered judgment on the claim of alimony during the pendency of the husband’s appeal from a jury verdict that he had committed adultery, we must vacate that judgment and remand this matter to the trial court for a redetermination of the alimony obligation.

This appeal arises from an action brought by the wife, Brenda Lewis, seeking *inter alia* a divorce and alimony from her husband, Ronald Lewis. In December 1995, a jury found that the husband had committed adultery and the district court entered judgment to that effect. From that judgment, the husband appealed to this court and in an unpublished opinion dated 7 January 1997, we affirmed. *Lewis v. Lewis*, COA96-793 (N.C. App. Jan. 7, 1997).

During the pendency of that appeal, the district court held a non-jury trial to determine the husband’s alimony obligation to his wife.

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[128 N.C. App. 183 (1997)]

The court entered judgment in that matter on 12 November 1996. This appeal from that judgment followed.

On appeal, the husband correctly points out that the court below was without jurisdiction to determine alimony pending resolution of the prior appeal. In *Bowes v. Bowes*, 19 N.C. App. 373, 198 S.E.2d 732 (1973), the plaintiff wife filed for divorce from her husband. *Id.* at 373, 198 S.E.2d at 733. After a jury verdict which found that her husband had abandoned her, the trial court entered judgment granting the divorce. *Id.* However, the trial court left other matters relating to the divorce action, including alimony, open for later determination. *Id.* The defendant then appealed from the judgment. *Id.*

During the pendency of the appeal, the trial court held two further hearings. *Id.* at 374, 198 S.E.2d at 733. We held that the trial court,

had no jurisdiction to hold hearings and enter judgments pending the appeal. We, therefore, choose to treat the purported appeal as a petition for a writ of certiorari which we have allowed. Because of the lack of jurisdiction in the trial court, the two judgments are vacated and the cause remanded for further proceedings.

Id. at 374, 198 S.E.2d at 733-34. (citations omitted).

The present case is factually indistinguishable from *Bowes*. Like *Bowes*, the trial court in this case had no jurisdiction to enter judgment on the alimony obligation during the pendency of the husband's appeal. Accordingly, as in *Bowes*, we treat this appeal as a petition for certiorari which we allow. Since the trial court lacked jurisdiction to enter the judgment of 12 November 1996, we vacate that judgment and remand for further proceedings.

Vacated and remanded.

Judges EAGLES and MARTIN, Mark D., concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 DECEMBER 1997

BECKER v. IREDELL COUNTY No. 97-451	Ind. Comm. (TA-13658)	Affirmed in part; Dismissed in part
BERGTHOLD v. AMERLINK, LTD. No. 97-215	Nash (95CVS1553)	Affirmed
DAILEY v. LANCE, INC. No. 97-12	Ind. Comm. (152243)	Affirmed
FREEMAN v. O'NEAL No. 97-281	Durham (93CVS1369)	No Error
GORE v. PHIPPS No. 96-1130	Brunswick (95CVS127)	Affirmed
GRAY v. WRANGLER No. 97-570	Ind. Comm. (334031)	Affirmed
HAIRSTON v. FIELDCREST CANNON, INC. No. 97-507	Ind. Comm. (445719)	Affirmed
IN RE CONLEY No. 97-250	Randolph (94J122)	Affirmed
IN RE JOHNSON No. 97-653	Johnston (96J137)	Vacated and Remanded
JAY'S MOUNTAIN ESTATE LANDOWNER'S ASSN. v. SMITH No. 97-526	Buncombe (96CVS5169)	Appeal Dismissed
LINDSEY v. MECKLENBURG COUNTY No. 97-259	Ind. Comm. (268153)	Affirmed
MCAULIFFE v. PRECISION DENTAL LAB No. 97-553	Ind. Comm. (367694)	Affirmed
PARKER v. N.C. DEPT. OF TRANSPORTATION No. 97-102	Ind. Comm. (TA-12581)	Affirmed
ROANOKE PROPERTIES LTD. PART. v. ROANOKE HARBOUR, INC. No. 96-1183	Dare (92CVS322)	Affirmed
STATE v. BARFIELD No. 97-356	Johnston (96CRS9132)	No Error

STATE v. BUCKLEY No. 97-766	New Hanover (96CRS13908) (96CRS13909)	No Error
STATE v. CALDWELL No. 97-583	Cabarrus (96CRS155) (96CRS156)	No Error
STATE v. CARTER No. 97-539	Halifax (94CRS9378)	Affirmed
STATE v. DURANT No. 97-474	Cumberland (93CRS19985) (93CRS19986)	Affirmed
STATE v. EDWARDS No. 97-500	Lenoir (96CRS1489) (96CRS6605)	No Error
STATE v. FREDERICK No. 97-298	Harnett (95CRS4170) (95CRS4171) (95CRS11516) (95CRS11517)	No error in the trial; Remanded for correction of judgments in 95CRS4170 and 95CRS4171.
STATE v. GRAHAM No. 97-64	Forsyth (96CRS20544)	No Error
STATE v. GRAVES No. 97-657	Mecklenburg (93CRS31633) (93CRS31644) (93CRS62323)	No Error
STATE v. GREEN No. 97-482	Davidson (90CRS13179)	No Error
STATE v. HENDRICKS No. 97-679	New Hanover (96CRS15551)	No Error
STATE v. HIGH No. 97-370	Wake (96CRS21203)	No Error
STATE v. HOLIDAY No. 97-328	New Hanover (95CRS28041)	No Error
STATE v. KNIGHT No. 97-485	Davidson (95CRS17353)	No Error
STATE v. KNIGHT No. 97-545	Hertford (96CRS003299)	No Error
STATE v. McGAHA No. 97-541	Cumberland (95CRS57004) (95CRS57005)	No Error

	(95CRS57006) (95CRS57007) (95CRS57008) (95CRS57009)	
STATE v. MORRIS No. 97-262	Buncombe (95CRS10837) (95CRS55676) (95CRS55677)	No Error
STATE v. MURPH No. 97-273	Alamance (92CRS30558)	Affirmed
STATE v. PEREZ No. 97-297	Cumberland (95CRS57072) (95CRS57073) (95CRS57074) (95CRS57075)	No Error
STATE v. PRICE No. 97-551	Rutherford (96CRS477) (96CRS1867)	No Error
STATE v. SPENCER No. 97-185	Buncombe (95CRS70908)	No Error
STATE v. THOMPSON No. 97-496	Onslow (95CRS20611)	No Error
TAYLOR v. TAYLOR No. 97-429	Bladen (96CVS533)	Dismissed
THOMAS v. VAN LEER No. 97-311	Mecklenburg (93CVS4979)	Affirmed
THOMAS v. VAN LEER No. 97-312	Mecklenburg (93CVS4979)	Affirmed
WATTS v. NORRIS No. 97-649	Columbus (96CVS737)	Dismissed

FILED 16 DECEMBER 1997

BEHNERT v. BEHNERT No. 96-1147	Durham (95CVD1449)	Affirmed
BLOUNT v. LANCE, INC. No. 96-1447	Ind. Comm. (159620)	Affirmed
DEPT. OF TRANSPORTATION v. SHARPE No. 97-21	Catawba (92CVS1802)	Affirmed
GREENE v. FIRST BANK No. 97-313	Stanly (95CVS769)	Dismissed

HINEMAN v. HINEMAN No. 97-334	Watauga (94CVD225)	Affirmed
J. T. RUSSELL & SONS v. CLANCY No. 97-362	Cabarrus (95CVS1764)	Affirmed
JAY ROBINSON, INC. v. FIRST PIEDMONT TRADING CO. No. 97-319	Mecklenburg (93CVS11599)	Affirmed
STATE v. BELL No. 97-109	Durham (95CRS21230) (95CRS21231)	No Error
STATE v. BELLAMY No. 97-168	Gaston (96CRS15354) (96CRS31492) (96CRS31493) (96CRS8009)	Dismissed
STATE v. BUSICK No. 97-120	Guilford (92CRS50405)	Vacated and Remanded
STATE v. EVANS No. 96-1460	Nash (94CRS7005) (94CRS7006) (94CRS7007)	No Error
STATE v. FERGUSON No. 97-43	Wilkes (95CRS1598) (95CRS1599)	Vacated and Remanded
STATE v. GRIFFIN No. 97-76	Cabarrus (96CRS1507)	No Error
STATE v. McDONALD No. 97-196	Cumberland (95CRS26373)	Reversed and Vacated

HOME INDEMNITY CO. v. HOECHST CELANESE CORP.

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THE HOME INDEMNITY COMPANY, THE HOME INSURANCE COMPANY, AND CITY INSURANCE COMPANY, PLAINTIFFS v. HOECHST CELANESE CORPORATION; AETNA CASUALTY & SURETY COMPANY; AIU INSURANCE COMPANY; ALL-STATE INSURANCE COMPANY; AMERICAN CENTENNIAL INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; AMERICAN MOTORIST INSURANCE COMPANY; AMERICAN PROFESSIONALS INSURANCE COMPANY; AMERICAN RE-INSURANCE COMPANY; ASSOCIATED INTERNATIONAL INSURANCE COMPANY; BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA; CALIFORNIA UNION INSURANCE COMPANY; CENTENNIAL INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYDS LONDON AND CERTAIN LONDON MARKET INSURANCE COMPANIES; CERTAIN UNDERWRITING SYNDICATES OF THE ILLINOIS INSURANCE EXCHANGE; CERTAIN UNDERWRITING SYNDICATES OF THE INSURANCE EXCHANGE OF THE AMERICAS; CIGNA INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; COMMERCIAL UNION INSURANCE COMPANIES; CONTINENTAL CASUALTY COMPANY; CONTINENTAL INSURANCE COMPANY; CRUM & FORSTER INSURANCE COMPANY; EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY; EMPLOYERS MUTUAL CASUALTY COMPANY; ERIC REINSURANCE COMPANY; EXCESS INSURANCE COMPANY, LIMITED; FEDERAL INSURANCE COMPANY; FIREMAN'S FUND INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY; FREMONT INDEMNITY INSURANCE COMPANY; GIBRALTAR CASUALTY COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY (GEICO); HARBOR INSURANCE COMPANY; HARTFORD ACCIDENT AND INDEMNITY COMPANY; HIGHLANDS INSURANCE COMPANY; HUDSON INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; INTERNATIONAL SURPLUS LINES INSURANCE COMPANY; LEXINGTON INSURANCE COMPANY; LONDON GUARANTEE AND ACCIDENT COMPANY OF NEW YORK; LUMBERMEN'S MUTUAL CASUALTY INSURANCE COMPANY; MEADOWS SYNDICATE, INC.; NATIONAL CASUALTY COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, P.A.; NEW ENGLAND INSURANCE COMPANY; NEW ENGLAND REINSURANCE COMPANY; NORTH RIVER INSURANCE COMPANY; NORTH STAR REINSURANCE CORPORATION; NORTHWESTERN NATIONAL CASUALTY COMPANY; NORTHWESTERN NATIONAL INSURANCE COMPANY; PACIFIC INSURANCE COMPANY; PROGRESSIVE AMERICAN INSURANCE COMPANY; PRUDENTIAL REINSURANCE COMPANY; ROYAL INDEMNITY COMPANY; SIGNAL INSURANCE COMPANY; ST. PAUL FIRE AND MARINE INSURANCE COMPANY; STONEWALL INSURANCE COMPANY; TORTUGA CASUALTY INSURANCE COMPANY; THE TRAVELERS INDEMNITY COMPANY; TWIN CITY FIRE INSURANCE COMPANY; VIK RE SYNDICATE, INC., UNDERWRITERS REINSURANCE COMPANY; UNITED INSURANCE COMPANIES, INC.; X.L. INSURANCE COMPANY LIMITED; ZURICH INSURANCE COMPANY; DEFENDANTS

No. COA97-459

(Filed 6 January 1998)

1. Insurance § 895 (NCI4th)—liability insurance—contamination discovered after expiration—no coverage

Under the discovery rule, general liability policies provided no coverage for environmental contamination that was not discovered until after the policies expired.

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2. Insurance § 1300 (NCI4th); Trial § 68 (NCI4th)—liability insurance—admissions—pollution exclusion clause—evidence of policy language—summary judgment

The insured was bound by its admissions in response to an excess liability insurer's motion for summary judgment that the excess policies incorporated by reference the terms of a primary policy which was properly before the court and that this policy contains a pollution exclusion clause; therefore, the insured could not avoid summary judgment for the excess insurer as to noncoverage of environmental contamination claims on the ground that the insurer did not file any evidence of policy language.

3. Insurance § 1300 (NCI4th)—excess liability insurance—no evidence of policy language—summary judgment for insurer inappropriate

There was insufficient evidence of record to support summary judgment for an excess liability insurer as to policies for which the insurer submitted no evidence of policy language and no evidence that these policies followed form to or incorporated by reference the underlying primary policies.

4. Insurance § 1300 (NCI4th)—excess liability insurance—declaration pages—authentication by attorneys—noncoverage of contamination claims—summary judgment

There was sufficient evidence of record to support entry of summary judgment in favor of an excess liability insurer as to noncoverage of environmental contamination claims where the insurer submitted declaration pages stating that its policies provided excess coverage by the terms and provisions of the underlying primary policy that was before the court, and the declaration pages were authenticated by the insurer's attorneys.

5. Trial § 75 (NCI4th)—insurance policies—authentication—affidavits of attorneys

Affidavits of attorneys of excess liability insurers based upon their personal knowledge were competent to authenticate the excess policies for purposes of summary judgment.

6. Insurance § 895 (NCI4th)—general liability insurance—pollution exclusion clause—use before approval by Commissioner of Insurance—subsequent approval—clause not void

Failure of insurers to get advance approval from the Commissioner of Insurance for an absolute pollution exclusion

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clause in general liability policies did not render the clause void where the clause was subsequently approved for use.

7. Insurance §§ 895, 1300 (NCI4th)—liability insurance—pollution exclusion clause—sudden and accidental exception—burden of proof

The insured bears the burden of proving that the “sudden and accidental” exception to the pollution exclusion clause in a general liability policy applies to restore coverage.

8. Insurance §§ 895 (NCI4th)—liability insurance—pollution exclusion clause—sudden and accidental exception—gradual contamination

The “sudden and accidental” exception to the pollution exclusion clause does not restore insurance for pollution contamination which occurs gradually over an extended period of time.

9. Insurance § 895 (NCI4th)—liability insurance—pollution exclusion clause—sudden and accidental exception—spills or leaks over time

Spills or leaks which occurred on a regular or sporadic basis during the day-to-day operations of a polyester manufacturing plant over an extended period of time did not come within the “sudden and accidental” exception to the pollution exclusion clause.

10. Insurance § 895 (NCI4th)—liability insurance—fire at manufacturing plant—de minimis contamination—sudden and accidental exception inapplicable

A fire at a polyester manufacturing plant did not constitute a sudden and accidental discharge that restored insurance coverage for pollution contamination where the insured failed to forecast evidence that the fire caused anything more than a de minimis amount of the total contamination.

Appeal by defendant Hoechst Celanese Corporation from order entered 21 November 1996 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 1996.

This appeal involves insurance coverage for contamination claims under primary and excess general liability policies issued to the insured, Hoechst Celanese Corporation (“HCC”) by 25 insurance carriers. Because the property in question is located in North

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Carolina, the appellees contend that G.S. 58-3-1 requires that North Carolina law applies. For purposes of this appeal which concerns only North Carolina sites, HCC does not contest that North Carolina law applies.

HCC has owned and operated a polyester manufacturing plant in Salisbury, North Carolina, since 1966. Pollutants generated in the normal course of operation have included glycol and Dowtherm. Glycol was disposed of at an on-site treatment plant from 1969 through 1974. HCC has also operated an on-site wastewater treatment plant since 1966. From 1966 through April 1990, the Salisbury plant also disposed of its waste at a nearby off-site landfill known as the Needmore Road landfill.

HCC's manufacturing operations at the Salisbury plant and disposal of waste at the Needmore Road landfill caused degradation of soil and groundwater. Glycol and Dowtherm were among the constituent contaminants identified in the groundwater. On 28 April 1988, the State of North Carolina issued two notices of non-compliance to HCC concerning the contamination of groundwater beneath the Salisbury Plant and the Needmore Road landfill. On 6 April 1990, the United States Environmental Protection Agency ("EPA") issued an administrative order directing further cleanup and investigation of the Salisbury Plant site. HCC has also been operating under a state mandate to clean up the contamination at the Needmore Road landfill. HCC seeks to recover the costs of environmental investigation, remediation and cleanup, aggregating over \$30 million for expenses at the Salisbury Plant and over \$15 million for expenses at the Needmore Road landfill.

HCC filed suit in New Jersey on seeking a determination that primary insurance policies issued to HCC cover the claims. On 9 March 1989, Home Indemnity Company ("Home"), one of the defendants in the New Jersey action, filed this action in North Carolina seeking a declaratory judgment on the same insurance policies and claims. Home named HCC as defendants, as well as all of HCC's primary and excess liability insurance carriers. In August 1989, this case was stayed to allow the New Jersey case to proceed, but that stay was lifted in December 1992.

On 15 March 1996, Home moved for partial summary judgment concerning claims arising from the site in Salisbury, North Carolina, which consists of the HCC plant in Salisbury and the Needmore Road landfill. Home argued that: (1) policies in effect from 1972 through

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1976 are not triggered by claims arising from property damage that occurred during those years because the contamination was not discovered until after the policies expired; and (2) pollution exclusions with exceptions for sudden and accidental releases bar coverage for claims arising from the Salisbury site. On 29 March 1996, defendants Lloyds London and Certain London Market Insurance Companies ("Lloyds") moved for partial summary judgment concerning the Salisbury site. Their motion was based on "absolute pollution exclusions" contained in certain Lloyds' policies. Following a hearing on 22 and 23 July 1996, partial summary judgment was entered in favor of both Home and Lloyds on 28 August 1996. The trial court certified the issues raised by the motions for immediate appeal pursuant to G.S. 1A-1, Rule 54(b). HCC appealed here as well as in 96-1408 and 96-1435. Those appeals are determined in opinions filed today.

In August and September 1996, the 25 insurance company defendants here moved to join in the partial summary judgment motions filed by Home and Lloyds. On 21 November 1996, the trial court granted partial summary judgment for the parties joining in the Home and Lloyds' motions. The trial court certified these issues for immediate appeal. HCC appealed on 19 December 1996. Motions to bypass this court were denied by the Supreme Court.

Parker, Poe, Adams & Bernstein, L.L.P., by Irvin W. Hankins, III and Josephine H. Hicks, for defendant-appellant Hoechst Celanese Corporation.

Lowenstein, Sandler, Kohl, Fisher & Boylan, by Michael Dore and David Field, for defendant-appellant Hoechst Celanese Corporation.

The Bishop Law Firm, P.A., by J. Daniel Bishop, for defendant-appellee Travelers Casualty and Surety Company formerly known as The Aetna Casualty and Surety Company.

Weissman, Nowack, Curry & Wilco, by Linda B. Foster, for defendant-appellee Travelers Casualty and Surety Company formerly known as The Aetna Casualty and Surety Company.

Underwood, Kinsey, Warren & Tucker, P.A., by Ralph Kinsey, for defendant-appellee Aetna Casualty and Surety Company.

Cozen & O'Connor, P.C., by Sheldon Karasik, for defendant-appellees American International Underwriter's Inc., American Home Assurance Company, Birmingham Fire Insurance

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Company of Pennsylvania, Insurance Company of the State of Pennsylvania, Lexington Insurance Company and National Union Fire Company of Pittsburgh, PA.

Robinson, Bradshaw & Hinson, P.A., R. Steven DeGeorge, for defendant-appellees AIU Insurance Company, Birmingham Fire Insurance Company of Pennsylvania, The Insurance Company of the State of Pennsylvania, Lexington Insurance Company, and National Union Fire Insurance Company of Pittsburgh, Pa.

Jackson & Campbell, P.C., by Richard S. Kuhl for defendant-appellees AIU Insurance Company, Birmingham Fire Insurance Company of Pennsylvania, The Insurance Company of the State of Pennsylvania, Lexington Insurance Company, and National Union Fire Insurance Company of Pittsburgh, Pa.

Stott, Hollowell, Palmer & Windham, by Martha R. Thompson, for defendant-appellees American Motorists Insurance Company and Lumbermen's Mutual Casualty Company.

Tressler, Soderstrom, Maloney & Priess, by Judith Fournie Helms, Sherrin Ross Ingram and James Pinderski, for defendant-appellees American Motorists Insurance Company and Lumbermen's Mutual Casualty Company.

Smith, Stratton, Wise, Heher & Brennan, by Wendy L. Mager, for defendant-appellee Centennial Insurance Company.

Frazier, Frazier & Mahler, by Torin L. Fury, for defendant-appellee Centennial Insurance Company.

Cohn & Russell, by Vicky Kaiser Russell, for defendant-appellee Century Indemnity Company, successor to CCI Insurance Company, successor to Insurance Company of North America.

Law Office of Mark A. Michael, by Mark A. Michael, for defendant-appellee Century Indemnity Company, successor to CCI Insurance Company, successor to Insurance Company of North America.

Mendes & Mount, LLP, by Gary P. Schulz and Henry Lee, for defendant-appellee Certain Underwriters at Lloyds London and Certain London Market Insurance Companies.

Kilpatrick Stockton, LLP, by Jackson N. Steele and Richard E. Morton, for defendant-appellee Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies.

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Rivkin, Radler & Kremer, by Richard S. Feldman and Leonard B. Cooper, for defendant-appellees Commercial Union Insurance Company and Fireman's Fund Insurance Company.

Bennett, Dawson & Guthrie, by Richard Bennett, for defendant-appellees Commercial Union Insurance Company and Fireman's Fund Insurance Company.

McElroy, Deutsch & Mulvaney, by Laurence McHeffey and Robert S. Albert, for defendant-appellees North River Insurance Company, Carum & Forster Insurance Company and International Surplus Lines Insurance Company.

Hill, Evans, Duncan, Jordan & Davis, by Lindsay R. Davis, Jr., for defendant-appellees North River Insurance Company, Carum & Forster Insurance Company and International Surplus Lines Insurance Company.

Tuggle, Duggins & Meschan, P.A., by J. Reed Johnston, Jr., for defendant-appellee Employers Mutual Casualty Company.

Robins, Kaplan, Miller & Ceresi, by Thomas B. Keegan and Timothy M. Block, for defendant-appellee Employers Mutual Casualty Company.

Cranfill, Sumner & Hartzog, L.L.P., by Stephanie Hutchins Autry, for defendant-appellee Federal Insurance Company.

Melito & Adolfsen, P.C., by Louis G. Adolfsen, for defendant-appellees Hartford Accident & Indemnity Company, First State Insurance Company, New England Insurance Company and Twin City Fire Insurance Company.

Cansler, Lockhart, Campbell, Evans, Bryant & Garlitz, P.A., by Hugh B. Campbell, for defendant-appellees Hartford Accident & Indemnity Company, First State Insurance Company, New England Insurance Company and Twin City Fire Insurance Company.

Leboeuf, Lamb, Greene & MacRae, by David R. Poe and Elizabeth B. Sandza, for defendant-appellee Hudson Insurance Company.

German, Gallagher & Murtagh, by Michael D. Gallagher and Jeffrey N. German, for defendant-appellee Stonewall Insurance Company.

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Rudisill & Brackett by J. Steven Brackett, for defendant-appellee Stonewall Insurance Company.

Hedrick, Eatman, Gardner & Kincheloe, by John Brem Smith, for defendant-appellees Associated International Insurance Company and Progressive American Insurance Companies.

EAGLES, Judge.

I

[1] We first consider whether the trial court erred in granting partial summary judgment on the grounds that coverage under the policies was not triggered by claims arising from property damage that occurred during the years in which the policies were in effect because the contamination was not discovered until after the policies expired.

In our companion opinion (96-1435) we have reaffirmed that *West American Ins. Co. v. Tufco Flooring East, Inc.*, 104 N.C. App. 312, 409 S.E.2d 692 (1991), *review allowed*, 330 N.C. 853, 413 S.E.2d 555, *review denied as improvidently granted*, 332 N.C. 479, 420 S.E.2d 826 (1992), in which this court applied the discovery rule to a property damage case, is the law of North Carolina in this factual situation. The discovery rule mandates that "for insurance purposes, property damage 'occurs' when it is manifested or discovered." *Id.* at 317, 409 S.E.2d at 695 (quoting *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986)). For a more detailed discussion of the arguments presented and this court's reaffirmation of the *Tufco* rule, see our opinion in *The Home Indemnity Co., et al, v. Hoechst Celanese Corp., et al* (96-1435).

By HCC's own responses to interrogatories, it is undisputed that the contamination was first discovered in 1980. Accordingly, based on the *Tufco* rule, it is clear that there can be no coverage for environmental contamination claims under policies that expired prior to 1980. In accordance with *Tufco*, we conclude that summary judgment was properly granted here for the following policies:

Aetna Casualty & Surety Company policy nos. 01XN171, 01XN707, 01XN867, 01XN868, 01XN1288, 01XN1576 and 01XN1682; American Home Assurance Company policy nos. CE2692030, CE2692031, CE2749507, CE2749508, CE355391, CE355392 and 8065544; American Motorists Insurance Company policy nos. 4ZM549159, 1CP-60143, 1CP-60435 and 3SB-005287;

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Centennial Insurance Company policy no. 462-01-31-57; Century Indemnity Company, Successor-in-Interest to CCI Insurance Company, Successor to Insurance Company of North America policy nos. XCP3753 and XBC042141; Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies policy nos. 89022, 89023, 89024, 89025, 50046, 52160, 52161, 52164, 52165, 53760, 55240, 55330, 55331, 55332, 55333, 55334, NF0860, NF0861, NF0864, NC4720 and NC5082; Commercial Union Insurance Company policy nos. 131LC2, 131LC3, 131LC4, 131LC10, 131LC11, CY-9500-002, CY-9500-034 and EY-9500-044; all Crum & Forster Insurance Company policies; Employers Mutual Casualty Company policy no. MMO 70027; Federal Insurance Company policy nos. 77378655 and FXL77378655; Fireman's Fund Insurance Company policy nos. XLX1202840 and XLX1269429; First State Insurance Company policy nos. 920298, 922376, 925974, 928017, 920878, 921283 and 923489; Hartford Accident & Indemnity Company policy no. 10XS100583; Insurance Company of the State of Pennsylvania policy nos. 41735440 and 41735441; International Surplus Lines Insurance Company policy nos. XSI1522 and XSI1523; Lexington Insurance Company policy nos. GL403087; GC403095, GC403374, C5504670, 5511228 and 500-00-24; Lumbermen's Mutual Casualty Company policy no. 5XS-010318; National Union Fire Insurance Company policy nos. 1170170 and 1170174; North River Insurance Company XS3708 and XS4429; Progressive American Insurance Company policy nos. SP-1157 and SP-1158; and Stonewall Insurance Company policy nos. D11514, D11515 and D11516.

Based on our disposition of this issue, we need not consider the remaining issues concerning the above listed policies because the remaining issues have been rendered moot.

II

We next consider whether the trial court erred in granting partial summary judgment when the motion was based on insurance policy language which HCC contends was not properly before the court. HCC argues that there is no admissible or competent evidence of record concerning any language in any insurance policy issued to HCC. First, HCC contends that some carriers relied on policy provisions in seeking partial summary judgment but did not file any evidence of policy language. Second, they contend that other carriers

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submitted copies of declaration pages with no evidence of policy language. Some of these were submitted without an affidavit. Finally, HCC argues that many carriers submitted copies of policies in support of their motions, some without an affidavit and others with affidavits from a lawyer who had no personal knowledge of the policies. Accordingly, HCC contends that because these carriers failed to produce any evidence that complies with Rule 56, the carriers failed to establish any ground for avoiding coverage for purposes of sustaining entry of partial summary judgment.

HCC's first argument, that some carriers did not file any evidence of policy language when seeking summary judgment, pertains only to certain policies of appellee North River Insurance Company ("North River"), because our determination in Part I, the *Tusco* discovery rule, was dispositive as to the policies of appellees Stonewall Insurance Company, Crum & Forster Insurance Company & International Surplus Lines Insurance Company. North River first argues that HCC waived objections based on lack of adequate "evidence" to sustain partial summary judgment by failing to object in its responses to the motions and by proceeding with the summary judgment hearing without objection. Second, they argue that their summary judgment motion could have been made with or without affidavits and that HCC itself admitted sufficient facts to justify the trial court's entry of summary judgment. North River asserts that HCC alleged that North River issued excess policies to HCC, and that the primary policies to which North River's policies were excess were already before the trial court. Furthermore, North River notes that HCC made the pollution exclusions under many of those primary policies part of the record through the affidavits of Randy Weston and Gary Schultz. Accordingly, North River asserts that all relevant policy language necessary for a proper determination of the summary judgment issue was properly before the trial court. Further, North River asserts that HCC did not contest the fact that policies were excess to and followed form to the primary or underlying excess policies in effect during the relevant policy periods. Accordingly, the appellees contend that summary judgment was properly granted.

[2],[3] We hold that there was sufficient evidence of record to support summary judgment in favor of North River on policy nos. 522-046851-3, 522-046852-2, 522-043223-4 and 522-055111-5. In HCC's response to North River's motion to join in Home's summary judgment motion, HCC admits that these policies at issue incorporate by reference the terms of Employers Insurance of Waussau policy number 5735-00-100731, and that the policy contains a "sudden and acciden-

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tal" pollution exclusion. The Wausau policy was properly before the court. In HCC's response to North River's motion to join in Lloyds' summary judgment motion, HCC admits that "[p]olicy no. 522-055111-5 contains an 'absolute' pollution exclusion precluding coverage for claims arising from pollution or contamination." HCC is bound by these admissions. Accordingly, there was sufficient evidence of record to support summary judgment in favor of North River as to those policies. However, there was insufficient evidence of record to support summary judgment in favor of North River on policy nos. 522-000-423-9 and 522-000445-5. As the moving party, the appellees must show that there are no factual issues in dispute and "no gaps" in their proof. *Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 721, 329 S.E.2d 728, 729 (1985). These appellees submitted no evidence of policy language to support their motions for summary judgment. While these policies may have been excess to underlying primary policies that were properly before the court, there was no evidence before the court that these policies followed form to or incorporated by reference those underlying policies. Accordingly, there remain genuine issues of material fact concerning the language of policy nos. 522-000-423-9 and 522-000445-5. The appellees failed to meet their burden of proof. We hold that summary judgment as to policy nos. 522-000-423-9 and 522-000445-5 should not have been granted based on policy language.

HCC's second argument pertains only to certain policies of appellee Federal Insurance Company ("Federal"), because our determination in Part I, the *Tufco* discovery rule, was dispositive as to the policies of appellees American Motorists Insurance Company and Lumbermen's Mutual Casualty Company. Federal argues that their declaration pages stated that the policies followed form to certain underlying Lloyds' policies and were thereby incorporated. Federal contends that appellees' attorneys properly authenticated their evidence, based on their personal knowledge that the declaration pages and policies were authentic. Federal notes that the decision to admit evidence is discretionary and there is no indication that the judge abused his discretion. Finally, the appellees argue that HCC never raised any genuine issue as to the accuracy, completeness, or authenticity of the policies. Only the interpretation of the policies and application of the facts were at issue. Accordingly, Federal maintains that summary judgment was properly granted.

[4] Federal submitted declaration pages stating that their policies provided excess coverage by the terms and provisions of the under-

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lying primary policy. The declaration pages were authenticated by their attorneys. *See Lockwood v. Wolf Corp.*, 629 F.2d 603, 611 (9th Cir. 1980) (attorney's affidavit is proper where the attorney has personal knowledge of the matters attested to in the affidavit). We hold that the trial court did not abuse its discretion in admitting and considering the evidence. Accordingly, there was sufficient evidence of record to support entry of summary judgment for Federal as to its policies.

[5] HCC's third argument pertains to the policies of appellees New England Insurance Company, American International Underwriters (AIU), Birmingham Fire Insurance Company of Pennsylvania, Twin City Fire Insurance Company, Associated International Insurance Company, and with respect to certain policies of National Union Fire Insurance Company, Lexington Insurance Company, First State Insurance Company, Employers Mutual Casualty Company, Hartford Accident & Indemnity Company, and Lloyds only. Our determination in Part I, the *Tufco* discovery rule, was dispositive as to the policies of appellees Insurance Company of Pennsylvania, Century Indemnity Company, Centennial Insurance Company and Progressive American Insurance Company. The remaining appellees assert that there is no evidence that the trial court abused its discretion in admitting the evidence. First, they argue that the attorneys' affidavits clearly comply with Rule 56(e) in that they are based on personal knowledge of the affiant, gained from representing in litigation the very insurance companies that issued the policies under consideration. Second, the appellees argue that HCC has not raised any genuine issue of material fact as to the accuracy or completeness of the policy language cited. Since the dispute involves only the interpretation of the excess policies' language and application of the policy language to the facts and not whether the language was actually contained in the policies themselves, the appellees argue that summary judgment was proper.

The attorneys' affidavits based on personal knowledge were competent to authenticate the policies and there was no genuine issue of material fact as to the relevant language. *See Lockwood*, 629 F.2d at 611. Accordingly, we hold there was sufficient evidence of record to support summary judgment for those policies. This assignment of error is overruled.

III

We next consider whether pollution exclusions contained in policies are rendered unenforceable because the policies with the exclusions

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sions were issued before being approved by the North Carolina Department of Insurance. HCC first argues that certain appellees used pollution exclusion language in policies issued before the pollution exclusion language was approved by the North Carolina Insurance Commissioner on 9 July 1973. Because of our determination in Part I, the *Tufco* discovery rule, this issue is moot and we need not address it.

[6] HCC additionally argues that certain appellees included absolute pollution exclusion language in policies issued before that language was approved by the North Carolina Insurance Commissioner on 24 February 1986. HCC maintains that the unapproved language should be void and unenforceable. In our companion opinion (96-1408) we determined that the failure of insurers to get advance form approval where the form is subsequently approved for use does not result in the absolute pollution exclusion being void. For more detailed discussion of the arguments presented and this court's analysis, see our opinion in *The Home Indemnity Co., et al. v. Hoechst Celanese Corp., et al* (96-1408). Accordingly, we hold that the policy should be enforced as written including the pollution exclusion language.

IV

We next consider whether the trial court properly granted partial summary judgment on the grounds that the claims were precluded by pollution exclusions contained in the policies. HCC contends that the carriers, as the moving party and insurer, had the burden of proving that the pollution exclusion language in its policies precludes coverage for HCC at the Salisbury site. HCC first argues that the language in many of the policies' pollution exclusions states that the "exclusion does not apply if" contamination is "sudden and accidental." HCC asserts that the evidence demonstrates that at least some of the damages at the site arise from releases that were "sudden and accidental." Furthermore, HCC maintains that other courts have concluded that where the facts show that there were discrete accidents, summary judgment is inappropriate. See, e.g., *Cessna Aircraft Co. v. Hartford Acc. & Indem. Co.*, 900 F.Supp. 1489 (D. Kan. 1995). HCC contends that the sudden nature of many of the releases and the extent of contamination caused by these accidents are unresolved issues of fact, rendering summary judgment inappropriate.

HCC also argues that some of the appellees joined in the Home summary judgment motion on the basis of significantly different pollution exclusion language. HCC claims that some of these policies

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contained pollution exclusions providing exceptions for “sudden or accidental” releases (emphasis added). HCC maintains that there is no dispute that the releases were accidental and accordingly the trial court erred in granting partial summary judgment to those companies. However, our determination in Part I, the *Tufco* discovery rule, was dispositive as to the claims based on all those policies which contained an exception to the pollution exclusion for “sudden or accidental” releases. Accordingly, we need not address this issue because it has become moot.

The appellees argue that the pollution exclusion applies based on its plain language. Appellees contend that North Carolina courts have stated that pollution which occurs gradually over time on an ongoing basis and are routine events is not “sudden and accidental” and does not fall under the exception to the exclusion. *See Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 696-701, 340 S.E.2d 374, 380-83, *rehearing denied*, 316 N.C. 386, 346 S.E.2d. 134 (1986). Furthermore, appellees argue that the insured must not only show that a release was sudden and accidental but the insured must also show that the release caused an appreciable amount of the damage and was not a de minimis event. The appellees contend that HCC’s evidence of the fire at the Dowtherm Heater Area is speculative at best. *See Highlands Ins. Co. v. Aerovox Inc.*, 424 Mass. 226, 676 N.E.2d 801 (Mass. 1997). Accordingly, the carriers argue that summary judgment was properly granted.

[7] HCC and the appellees each assert that the other bears the burden of proof on the issue of whether the “sudden and accidental” exception to the pollution exclusion applies to restore coverage excluded under the pollution exclusions. The vast majority of courts have held that the insurer bears the burden of establishing the existence and applicability of a policy exclusion, while the insured has the burden of proving that an exception to the exclusion exists and applies to restore coverage. *See Peerless Ins. Co. v. Strother*, 765 F. Supp. 866, 871 (E.D.N.C. 1990). *See also SnyderGeneral Corp. v. Great American Ins. Co.*, 928 F.Supp. 674, 680 n.5 (N.D. Tex. 1996). We agree and hold that HCC bears the burden of proving that the sudden and accidental exception to the pollution exclusion applies here to restore coverage.

[8],[9] We hold that HCC has failed to carry its burden of proving that the exception to the pollution exclusion applies here. The “sudden and accidental” exception was construed by our Supreme Court in

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Waste Management to prohibit insurance coverage for pollution contamination which occurs gradually over an extended period of time. See *Waste Management*, 315 N.C. at 696-701, 340 S.E.2d at 380-83. In upholding the pollution exclusion, the court in *Waste Management* articulated the policy reasons behind the exclusion:

The policy reasons for the pollution exclusion are obvious: If an insured knows that liability incurred by all manner of negligent or careless spills and releases is covered by his liability policy, he is tempted to diminish his precautions and relax his vigilance [P]utting the financial responsibility for pollution that may occur over the course of time upon the insured places the responsibility to guard against such occurrences upon the party with the most control over the circumstances most likely to cause the pollution.

Id. at 697-98, 340 S.E.2d at 381. Just as in *Waste Management*, most of HCC's claims involve the leaching of contaminants that occurred gradually over an extended period of time. However, HCC has argued that several discrete events occurred, such as releases due to pump seal leaks, gasket failures, etc. which caused contamination and therefore fall within the "sudden and accidental" exception. However, HCC has failed to carry its burden of proving that these events are within the "sudden and accidental" exception. In *Waste Management*, our Supreme Court recognized that discharges that "occurred on a 'regular or sporadic basis from time to time'" are not sudden. *Id.* at 701, 340 S.E.2d at 383 (discussing *Techalloy Co. v. Reliance Ins. Co.*, 338 Pa. Super. 1, 487 A.2d 820 (1984)). Numerous other jurisdictions have also recognized that spills and leaks which have occurred during the day-to-day operations and which present an overall pattern of discharges, are not sudden and accidental. See *Peerless*, 765 F. Supp. at 871 ("allegations suggest a pattern of repetitive activity which led to the environmental pollution").

[10] HCC finally contends that a 1974 fire in the Dowtherm Heater Area was a sudden and accidental discharge. However, the fire falls squarely within the facts of a recently decided Massachusetts case. In *Aerovox*, 424 Mass. at 226, 676 N.E.2d at 801, Massachusetts' highest court determined that:

Because Aerovox has not shown an ability to prove a causal link between the fire and any more than a de minimis amount of the damages for which it is now liable, we agree with the motion judge that summary judgment is appropriate. The only proof Aerovox has presented on the question of causation is the affi-

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davit of David Herer, a civil engineer and member of the remediation team at the Re-Solve site. His affidavit states that the fire released a 'significant volume' of hazardous contaminants and solvents which 'because of persistence and migration' were still causing damage at the time of the policy periods and for which Aerovox was being held liable. The Herer affidavit does tend to show that the fire released contaminants and that they may have caused damage throughout the relevant period. Aerovox must show more than that to make its case. In the context of this case where contaminants were regularly released over the course of decades, Aerovox must have a reasonable prospect of showing that the fire caused an appreciable and compensable proportion of the damage The fire could only have released at most a small proportion of the contaminants which the facility released over the course of its twenty-four years in operation The Herer affidavit does not specify the amount or nature of the damage from the fire in relationship to the damage caused by the regular, long-term release of large volumes of pollution in the course of ordinary operations of the plant. It does not indicate whether greater total damage was done at the site because of the fire, nor does it indicate there is a way to make such a judgment that is not speculative. Based on the inability to produce such evidence, there is no way for a jury to determine that the fire, rather than ordinary business practices caused the damage. Because Aerovox has produced insufficient evidence that the fire was a more than de minimis cause of its liability, we conclude that no 'fair-minded jury could return a verdict for [Aerovox] on the evidence presented' and that summary judgment is therefore warranted.

Id. at 234-35, 676 N.E.2d at 806-07 (citations omitted). HCC has failed in their forecast of evidence to support their contention that the fire was a sudden and accidental event that caused an appreciable amount of the contamination HCC is being required to clean up. HCC bases its arguments on the testimony of two HCC employees, Steve Simpson and Michael Freeze. Simpson and Freeze were unable to say how much Dowtherm was released in connection with the fire, only that in hindsight, they believed it contributed to soil and groundwater contamination. HCC also relies on an accident report prepared by its Salisbury plant manager in 1974. However, the report makes no mention of any Dowtherm on the ground or any soil or groundwater contamination. Just as in *Aerovox*, HCC has presented evidence that the fire released contaminants that may have caused some damage.

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However, HCC has failed to forecast evidence that the damages caused by the fire were anything more than a de minimis amount of the total contamination. Furthermore, HCC has failed to forecast anything more than speculative evidence on the issue.

Accordingly, because HCC has not carried its burden of proving that the "sudden and accidental" exception restores coverage for the contamination, we hold that summary judgment was properly granted.

In conclusion, we affirm summary judgment as to all parties and policies except for North River policy nos. 522-000423-9 and 522-000445-5. We reverse partial summary judgment in the two North River policies because there was insufficient evidence of record to support the trial court's grant of summary judgment on those policies.

Affirmed in part, reversed and remanded in part.

Judges WYNN and MARTIN, Mark D., concur.

MICHAEL ANTHONY WILLIAMS AND KATHERINE WILLIAMS, PLAINTIFFS v. RONALD FLOYD HOLSCLOW AND CITY OF RALEIGH, DEFENDANTS

No. COA96-1534

(Filed 6 January 1998)

1. Municipal Corporations § 445 (NCI4th)— automobile accident—police officer—damages sought less than insurance policy—immune

The trial court did not err by granting summary judgment for defendant City and a police officer, in his official capacity, in a negligence action arising from an automobile accident in which the officer was involved while on duty where plaintiffs sought damages less than \$1,000,000 and the City had purchased liability insurance for claims between \$1,000,000 and \$10,000,000.

2. Public Officers and Employees § 35 (NCI4th)— police officer—automobile accident—no personal liability

The trial court properly granted summary judgment in favor of defendant law enforcement officer in his individual capacity on a negligence claim arising from an automobile accident in which he was involved while responding to a call where plaintiffs sought

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monetary damages against the City and the officer, so that they were seeking recovery from the officer in both his individual and official capacities even though the caption was silent as to the capacity in which he was sued; it is undisputed that the officer is a public official; his actions fall within the scope of his official discretion as a police officer; and plaintiffs advanced no allegations of corruption or malice.

3. Insurance § 518 (NCI4th)— collision with police vehicle—immunity—availability of UM coverage

The trial court erred by granting defendant insurer's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff was involved in an automobile accident with a police officer who was responding to a call; summary judgment was granted for the City and the officer because the officer's actions fell within his official discretion and plaintiffs' claim was for an amount less than the City's insurance coverage; and defendant was plaintiffs' uninsured motorist insurer. Although N.C.G.S. § 20-279.21(b)(3) contains a restriction to persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and plaintiffs were not legally entitled to recover from the officer because he was immune, the statute also expressly excepts vehicles owned by political subdivisions from the legally entitled to recover exclusion. A section of a statute dealing with a specific situation controls other sections which are general and barring compensation based solely on being rear-ended by a municipal vehicle is contrary to the remedial purpose of the statute. Moreover, precluding coverage in no way advances the rationale supporting the doctrine of sovereign immunity and the inequity of depriving an insured party of the benefit of his or her UM premium is self-evident.

Judge GREENE concurring.

Judge WYNN concurring in the result.

Appeal by plaintiffs from orders entered 4 October 1996 and 24 October 1996 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 28 August 1997.

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Fuller, Becton, Slifkin & Bell, by James C. Fuller, Asa L. Bell, Jr., and Maria J. Mangano, for plaintiff-appellants.

Raleigh City Attorney Thomas A. McCormick, by Associate City Attorney Dorothy K. Woodward, for defendant-appellees.

Law Offices of Robert E. Ruegger, by Robert E. Ruegger, for unnamed defendant-appellee Integon Indemnity Corporation.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher, amicus curiae, for North Carolina Academy of Trial Lawyers.

MARTIN, Mark D., Judge.

Plaintiffs appeal from orders granting summary judgment to defendants Ronald Holsclaw (Officer Holsclaw) and the City of Raleigh (collectively the municipal defendants) and dismissing unnamed defendant Integon Indemnity Corporation (Integon).

On 13 November 1994 plaintiff Michael Williams (Williams) was involved in an automobile accident with Officer Holsclaw, an on-duty City of Raleigh (City) police officer. Officer Holsclaw, while responding to a call, switched channels on his police radio to monitor the situation. After changing the channel, he saw Williams' vehicle ahead of him but was unable to avoid impact. As a result of this collision, Williams suffered injuries and his automobile was damaged.

On 19 December 1995 Williams and his wife, Katherine, filed suit against the municipal defendants alleging Officer Holsclaw's negligence caused the collision. Defendants answered and alleged the claims were barred by sovereign immunity and public officer immunity. Plaintiffs then served the uninsured motorist carrier, unnamed defendant Integon.

On 18 July 1996 Integon filed a motion to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6). On 9 August 1996 the municipal defendants filed a motion for summary judgment. On 4 October 1996 the trial court granted the municipal defendants' motion for summary judgment on the grounds of governmental immunity and public officers' immunity. On 24 October 1996 the trial court granted Integon's motion to dismiss. Specifically, as plaintiffs were legally prevented from recovering against the municipal defendants, Williams' uninsured motorist (UM) carrier, Integon, was also shielded from liability under the UM statute.

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[1] On appeal, plaintiffs contend the doctrine of sovereign immunity does not shield the municipal defendants from liability.

"Under the doctrine of governmental immunity, a municipality is not liable for the torts of its officers and employees if the torts are committed while they are performing a governmental function." *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993), *disc. review denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). Law enforcement is well established as a governmental function. *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990).

Officer Holsclaw was performing his official duties as a police officer when he responded to a call at the time of the collision. Therefore, the City and Officer Holsclaw, in his official capacity, are generally immune from suit under the governmental immunity doctrine. *Taylor*, 112 N.C. App. at 607, 436 S.E.2d at 279 (police officers, as public officers, share in the immunity of their governing municipalities).

A municipality may waive immunity, however, by purchasing liability insurance or by joining a local government risk pool. N.C. Gen. Stat § 160A-485 (1994); *Combs v. Town of Belhaven*, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992) (discussing the purchase of insurance). The municipality generally retains civil tort liability immunity to the extent it does not participate in a local governmental risk pool or purchase liability insurance. N.C. Gen. Stat. § 160A-485 (1994).

The record in the instant action indicates the City purchased liability insurance for claims between \$1,000,000 and \$10,000,000, but is wholly uninsured for claims under or above this range. Because plaintiffs seek damages less than \$1,000,000, immunity has not been waived and the City and Officer Holsclaw, in his official capacity, are entitled to summary judgment.

[2] Although Officer Holsclaw is immune from suit in his official capacity, we must still determine whether he can be held personally liable in his individual capacity. Our Supreme Court recently noted, "[the] crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged." *Meyer v. Walls*, 347 N.C. 97, —, 489 S.E.2d 880, 887 (1997) (quoting Anita R. Brown-Graham & Jeffrey S. Koeze, *Immunity from Personal Liability under State*

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Law for Public Officials and Employees: An Update, Loc. Gov't L. Bull. 67, at 7 (Inst. of Gov't, Univ. of N.C. at Chapel Hill), Apr. 1995).

If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is an official-capacity claim; if the latter, it is an individual-capacity claim; and if it is both, then the claims proceed in both capacities.

Id.

The caption of the present complaint is silent as to whether Officer Holsclaw is sued in his official or individual capacity. Plaintiffs do indicate, however, they are seeking monetary damages from both the City and Officer Holsclaw. As a result, plaintiffs are seeking recovery from Officer Holsclaw in both his individual and official capacities.

It is undisputed that Officer Holsclaw is a public official. *See Jones v. Kearns*, 120 N.C. App. 301, 305, 462 S.E.2d 245, 247, *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995). “As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability.” *Collins v. North Carolina Parole Commission*, 344 N.C. 179, 183, 473 S.E.2d 1, 3 (1996) (quoting *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976)).

After careful review of the record, we conclude Officer Holsclaw's actions fall within the scope of his official discretion as a police officer. In addition, plaintiffs do not advance allegations of corruption or malice. Accordingly, summary judgment was properly granted in favor of Officer Holsclaw in his individual capacity.

[3] Plaintiffs alternatively contend that Integon, as Williams' UM carrier, should not benefit from the defense of governmental and public officer immunity, and, consequently, should be obligated to provide UM coverage to Williams. We agree.

The UM statute, N.C. Gen. Stat. 20-279.21(b)(3), states, in broad, declaratory terms, “[n]o policy of bodily injury liability insurance . . . shall be delivered or issued for delivery in this State . . . unless coverage is provided therein or supplemental thereto . . . for the protection of persons insured thereunder who are *legally entitled to recover*

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damages from owners or operators of uninsured motor vehicles" (emphasis added).

According to *Brown v. Casualty Co.*, 285 N.C. 313, 319, 204 S.E.2d 829, 834 (1974), a plaintiff's right to recover against his insurer under the UM endorsement is derivative and conditional on plaintiff being legally entitled to recover against the tortfeasor.

Because Officer Holsclaw was immune from suit and plaintiffs were therefore not legally entitled to recover, the trial court dismissed plaintiffs' claims against Integon. Notwithstanding the "legally entitled to recover" restriction imposed by section 20-279.21, plaintiffs submit that Integon should be responsible for payment under its UM policy with Williams.

The "legally entitled to recover" restriction was first reviewed in *Brown*, a wrongful death action where plaintiff did not file his complaint against the tortfeasor within the statute of limitations. In determining the UM carrier was not liable, the Supreme Court noted

[t]o be "legally entitled to recover damages", a plaintiff must not only have a cause of action but a remedy by which he can reduce his right to damage to judgment. . . . Plaintiff's right to recover against his intestate's insurer under the uninsured motorist endorsement is derivative and conditional. . . . Any defense available to the uninsured tortfeasor should be available to the insurer. The argument that a plea of the statute of limitations is personal to the tortfeasor and not available to the insurance company flies in the face of the policy.

Brown, 285 N.C. at 319-320, 204 S.E.2d at 833-834.

Subsequent North Carolina cases have strictly interpreted the "legally entitled to recover" language. For example, in *Spivey v. Lowery*, 116 N.C. App. 124, 446 S.E.2d 835 (1994), an underinsured motorist (UIM) coverage case, plaintiff's general release of the tortfeasor barred any claim against the carrier. In reaching this conclusion, the *Spivey* court reaffirmed the rule that an insurance carrier's liability is derivative of the tortfeasor's liability. *Id.* at 128, 446 S.E.2d at 838.

Similarly, in *Grimsley v. Nelson*, 342 N.C. 542, 467 S.E.2d 92, *reh'g denied*, 343 N.C. 128, 468 S.E.2d 774 (1996), plaintiffs' complaint was dismissed where they failed to properly serve the alleged tortfeasor. The Court affirmed the dismissal of plaintiffs' UM carrier because its

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only obligation was to pay any potential judgment against the defendant, which was no longer possible due to lack of jurisdiction. *Id.* at 548, 467 S.E.2d at 96.

An exception to strict interpretation of the “legally entitled to recover” restriction was noted in *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 294, 378 S.E.2d 21, 25 (1989), a wrongful death action involving an automobile accident which killed plaintiff’s son. Plaintiff violated the terms of her insurance policy by settling with the driver and his insurance carrier without giving notice to her UIM carrier. Plaintiff then brought an action against her UIM carrier to recover the deficiency. Defendant carrier claimed plaintiff was no longer entitled to recover from her UIM carrier because she was no longer entitled to recover from the tortfeasor. *Id.* at 292-293, 378 S.E.2d at 24.

The *Silvers* Court disagreed, holding the action against the UIM carrier could survive entry of a consent judgment between plaintiff and the tortfeasor (and his insurer). *Id.* at 296, 378 S.E.2d at 26. What distinguished the case from *Brown*, according to the court, was the existence of additional language in the UIM statute indicating a UIM payment would not be made until the vehicle insurance had been exhausted, either through judgment or settlement. *Id.* at 294-295, 378 S.E.2d at 25.

To resolve the ambiguity in these two provisions, the Supreme Court looked to the legislature’s purpose and intent in drafting the UIM statute. Because the statute was remedial in nature, the Court reasoned it should be “liberally construed to effectuate its purpose of providing coverage for damages to injured parties caused by insured motorists with liability coverage not sufficient to provide complete compensation for the damages.” *Id.* at 296, 378 S.E.2d at 26 (quoting *Silvers v. Horace Mann Ins. Co.*, 90 N.C. App. 1, 5, 367 S.E.2d 372, 375 (1988)). Based on principles of statutory interpretation and the remedial purpose underlying the statute, the Court concluded it was not the intent of the General Assembly to prohibit plaintiff from recovering UIM benefits from her carrier. *Id.* As a result, the Supreme Court held plaintiff’s consent judgment with tortfeasor did not bar her, as a matter of law, from recovering under her UIM policy. *Id.*

In *Gurganious v. Integon General Ins. Corp.*, 108 N.C. App. 163, 423 S.E.2d 317 (1992), *disc. review denied*, 333 N.C. 538, 429 S.E.2d 558 (1993), a suit for damages stemming from an automobile accident, this Court found a similar statutory ambiguity in the UIM statute and held plaintiffs were not barred from recovering UIM benefits

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from defendant even though their suit against the tortfeasor had been dismissed with prejudice. *Id.* at 168, 423 S.E.2d at 320.

Admittedly, the *Silvers* and *Gurganious* holdings represent narrow exceptions to *Brown's* UM and UIM derivative liability doctrine. Nonetheless, *Silvers* and *Gurganious* modify the general rule of *Brown* where there is conflicting and ambiguous statutory language.

We therefore turn to closer review of the UM statute. Specifically, in defining “uninsured motor vehicle,” section 20-279.21(b)(3) provides the term shall *not* include “[a] motor vehicle that is owned by the United States of America, Canada, a state, or any agency of any of the foregoing (excluding, however, political subdivisions thereof).” (emphasis added). In other words, vehicles owned by political subdivisions, including the City, are expressly excepted from the statutory exclusion.

Three well established canons of statutory construction coalesce to reveal the legislative intent behind section 20-279.21(b)(3). First, it is beyond question that “a section of a statute dealing with a specific situation controls . . . other sections which are general in their application.” *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969). Specifically, “the specially treated situation is regarded as an exception to the general provision.” *Id.*

When the conflicting provisions embodied in section 20-279.21(b)(3) of the UM statute are construed under this canon of construction, it is manifest that the particular provision, which excepts vehicles owned by political subdivisions from the statutory exclusion, is more narrowly tailored than the very broad “legally entitled to recover” proviso found in section 20-279.21(b)(3).

Second, an individual section of a statute will not be interpreted in such a manner that renders another provision of the same statute meaningless. *Brown v. Brown*, 112 N.C. App. 15, 21, 434 S.E.2d 873, 878 (1993). “All parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable interpretation.” *State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990). In addition, a construction of a statute that hinders its purpose must be avoided if courts can reasonably do so without doing violence to the legislative language. *Id.*

Perhaps most importantly, the nature of the UM statute is remedial and therefore should be liberally construed to accomplish the

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beneficial purpose intended by the General Assembly. *Hendricks v. Guaranty Co.*, 5 N.C. App. 181, 184, 167 S.E.2d 876, 878 (1969). The purpose of the statute is to provide some financial recompense to innocent persons who receive bodily injury or property damage due to the negligence of uninsured motorists or those unidentified drivers who leave the scene of an accident, *i.e.*, those who cannot be made to respond to damages. *Id.*

Barring compensation to injured motorists based solely on the fortuity of being rear-ended by a “municipal” vehicle is contrary to the remedial purpose of the UM statute. Moreover, precluding UM coverage in the present case in no way advances the rationale supporting the doctrine of sovereign immunity. Finally, the patent inequity of depriving an insured party of the benefit of his or her UM premium is self-evident.

Accordingly, plaintiffs are not barred from recovering UM benefits from Integon due to the immunity granted to Officer Holsclaw and the City. We therefore affirm the trial court’s grant of summary judgment in favor of the municipal defendants and reverse the trial court’s dismissal of unnamed defendant Integon.

Affirmed in part and reversed in part.

Judge GREENE concurs with separate opinion.

Judge WYNN concurs in the result only with separate opinion.

Judge GREENE concurring.

I agree with the majority that Integon is required to provide uninsured motorist coverage to the plaintiff in this case. To hold otherwise would circumvent the intent of section 20-279.21(b)(3) to provide insurance coverage to insured parties who are injured and damaged by persons not having liability insurance. See N.C.G.S. § 20-279.21(b)(3) (1993). Furthermore, to allow the uninsured carrier to assert the municipality’s sovereign immunity would circumvent the intent of the legislature that vehicles owned by municipalities can be uninsured vehicles within the meaning of section 20-279.21(b)(3). The lack of insurance by the municipality qualifies the vehicle as an uninsured vehicle within the meaning of section 20-279.21(b)(3). It would be absurd to believe that the legislature intended that this same lack of insurance would simultaneously disqualify the vehicle from uninsured insurance coverage within the meaning of section 20-

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279.21(b)(3). *See Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978) (courts must construe statutes so as to avoid absurd results). For these additional reasons I join with the majority in reversing the trial court's grant of Integon's motion to dismiss.

Judge WYNN concurring in the result:

Since the doctrine of sovereign immunity bars any recovery by Mr. and Mrs. Williams from the City of Raleigh or its negligent officer, *see, Jones v. Kearns*, 120 N.C. App. 301, 462 S.E.2d 245, *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995) (Wynn, J. concurring in the result), it would indeed add further insult to Mr. Williams' injuries to deny him an opportunity to recover under the uninsured motorist provision of his own insurance policy. Whether we term the application of the doctrine of sovereign immunity as a shield from liability is unimportant, the net effect is that the City maintains no insurance coverage for the negligent acts of its employees for damages under \$1,000,000.00. In short, as to Mr. Williams, the City is uninsured. Under the circumstances of this case, finding coverage under the uninsured motorist provision of the policy is the correct outcome.

TERRY W. BANKS, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF TERECIA L. BANKS; DEBORAH P. BOWMAN, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF K. DAWN BOWMAN; SUSAN G. CAMERON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF CARRIE D. CAMERON; MICHAEL W. MOORE, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF MATTHEW W. MOORE; PAUL J. PLESS, JR., INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF JOSEPH H. PLESS; BENNIE LEE TATE, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF CHARMIE A. TATE; AND THE BUNCOMBE COUNTY BOARD OF EDUCATION, A BODY CORPORATE, PLAINTIFFS-APPELLANTS v. THE COUNTY OF BUNCOMBE, A BODY POLITIC AND CORPORATE OF THE STATE OF NORTH CAROLINA; AND THE BOARD OF COMMISSIONERS FOR THE COUNTY OF BUNCOMBE, GOVERNING BOARD OF THE COUNTY OF BUNCOMBE, DEFENDANTS-APPELLEES AND ASHEVILLE CITY BOARD OF EDUCATION, A BODY CORPORATE, INTERVENOR DEFENDANT-APPELLEE

No. COA97-180

(Filed 6 January 1998)

1. Schools § 70 (NCI4th); Taxation § 145 (NCI4th)—residual sales and use tax—distribution to city and county schools—method of distribution

The trial court did not err in an action arising from a dispute over the distribution of residual sales tax funds to county and city

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school systems by the Buncombe County Board of Commissioners by concluding that there is no conflict between N.C.G.S. § 105-472(b)(2), which involves the ad valorem method of distribution, and N.C.G.S. § 115C-430, which involves apportionment by membership of each unit. The statutes involve different subject matters; under the express mandate of N.C.G.S. § 105-472(b)(2), the County serves merely as a conduit or agent of the taxing district in passing through funds over which the County has no claim or control, while N.C.G.S. § 115C-430 deals with discretionary appropriations by the County to each school district's current expense fund. The legislature did not intend for N.C.G.S. § 115C-430 to supersede N.C.G.S. § 105-472(b)(2) because distribution of the residual sales taxes under N.C.G.S. § 105-472(b)(2) is dependent upon the levy of ad valorem taxes within the taxing district.

2. Schools § 70 (NCI4th); Taxation § 145 (NCI4th)—residual sales and use tax—distribution to city and county schools—statutes not in conflict

The trial court did not err in an action arising from a dispute over the distribution of residual sales tax funds between county and city school systems by the Buncombe County Board of Commissioners by concluding that N.C.G.S. § 105-472(b)(2) was not repealed by N.C.G.S. § 115C-424, which states that all provisions of general laws and local acts in conflict with the provisions of that Article are repealed. N.C.G.S. § 105-472(b)(2) and N.C.G.S. § 115C-430 are not in conflict.

3. Schools § 70 (NCI4th); Taxation § 145 (NCI4th)—residual sales and use tax—distribution to city and county schools—specific statute controls general

The trial court did not err in an action arising from a dispute over the distribution of residual sales tax funds between county and city school systems by the Buncombe County Board of Commissioners by concluding that N.C.G.S. § 115C-430 did not govern distributions of the residual sales taxes to the current expense funds of each district. N.C.G.S. § 115C-430 is a general statute dealing with the distribution of county appropriations to multiple school districts within the County, while N.C.G.S. § 105-472(b)(2) is a specific statute dealing with the distribution of sales tax proceeds to taxing districts within the County. The specific statute controls.

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4. Constitutional Law § 94 (NCI4th)— residual sales tax—method of distribution to city and county schools—equal protection not violated

The trial court did not err in an action arising from a dispute over the distribution of residual sales tax funds between county and city school systems by the Buncombe County Board of Commissioners by concluding that the ad valorem method of distributing residual sales taxes under N.C.G.S. § 105-472(b)(2) was not unconstitutional under the equal protection clause of Article I, Section 29 of the North Carolina Constitution. The North Carolina Supreme Court has recently addressed a similar issue in *Leandro v. State of North Carolina*, 346 N.C. 336, and concluded that the equal opportunities clause does not require substantially equal funding or educational advantages in all school districts and that the equal protection clause was not violated since the equal opportunities clause was not violated. The Court of Appeals has also determined that students in public schools do not have a fundamental right to uniform educational opportunities.

5. Constitutional Law § 100 (NCI4th)— residual sales tax—method of distribution to city and county schools—due process not violated

The trial court did not err in an action arising from a dispute over the distribution of residual sales tax funds between county and city school systems by the Buncombe County Board of Commissioners by concluding that plaintiffs were not deprived of due process under the North Carolina Constitution where plaintiffs were not deprived of equal access to the sound basic education they were guaranteed by the North Carolina Constitution.

Judge WYNN dissenting.

Appeal by plaintiffs-appellants from judgment entered 3 September 1996 by Judge Ronald E. Bogle in Buncombe County Superior Court. Heard in the Court of Appeals 7 October 1997.

Roberts & Stevens, P.A., by Walter L. Currie and Cynthia S. Lopez, for plaintiffs-appellants.

Joseph A. Connolly, Buncombe County Attorney, for defendants-appellees Buncombe County and the Board of Commissioners for Buncombe County.

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Schwartz & Shaw, P.L.L.C., by Richard A. Schwartz and Brian C. Shaw, for intervenor defendant-appellee Asheville City Board of Education.

WALKER, Judge.

Buncombe County (the County) contains two separate school districts, the Buncombe County Schools (County Schools) and the Asheville City Schools (City Schools). The average daily membership (ADM) for the County Schools for fiscal years 1993-94 (FY 1993-94) and 1994-95 (FY 1994-95) was eighty-four percent (84%) of the total student population of the County, while the ADM for the City Schools during the same time period was sixteen percent (16%).

On 10 March 1995, plaintiffs filed suit against the County and the County Board of Commissioners challenging the County's method of distributing funds to the two school districts. In their complaint, plaintiffs made the following allegations and requests for relief: (1) that the County is bound to follow N.C. Gen. Stat. § 115C-430 in apportioning the residual local sales and use taxes between the two schools, and that N.C. Gen. Stat. § 105-472 was repealed by N.C. Gen. Stat. § 115C-424; (2) that N.C. Gen. Stat. § 115C-430 and N.C. Gen. Stat. § 105-472 are in conflict, and the County is bound to follow N.C. Gen. Stat. § 115C-430; (3) that the County is a taxing district under N.C. Gen. Stat. § 105-472(b)(2), and is therefore entitled to a share of the residual sales taxes; (4) that plaintiffs' constitutional rights to equal protection of the laws have been violated "by virtue of this arbitrary, capricious and irrational system of funding public education in Buncombe County;" (5) that plaintiffs have been deprived of liberty and property without due process of the law by virtue of the North Carolina Compulsory Attendance Law and the County's distribution of the residual sales taxes; and (6) that plaintiffs are entitled to a preliminary injunction prohibiting the County from distributing any residual sales taxes after 1 July 1995 until a final judgment is reached in this matter.

On 10 June 1995, the trial court allowed the City Schools to intervene in the action pursuant to Rule 24 of the North Carolina Rules of Civil Procedure. All the parties filed stipulations of facts and issues on 10 June 1996, in which the third claim for relief and the request for a preliminary injunction were withdrawn. Following a trial, judgment was entered for the defendants and intervenor-defendant on all issues on 3 September 1996.

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The trial court made the following findings and conclusions in support of its judgment. The County Schools and City Schools receive funding from a variety of sources, including local sales taxes, ad valorem taxes, and Federal and State grants. *See* N.C. Gen. Stat. § 115C-426 (1994). Since figures for fiscal year 1995-96 (FY 1995-96) were incomplete, the trial of this matter focused on FY 1993-94 and FY 1994-95. For these two fiscal years (FYs 1993-95), the County appropriated the following total amounts from its General Fund to the local current expense fund of each school district on an ADM basis: \$8,400,696.00 to the City Schools and \$43,328,225.00 to the County Schools.

In addition, the County is authorized to levy additional local government sales and use taxes (sales taxes) pursuant to Articles 39 (1 cent tax), 40 ($\frac{1}{2}$ cent tax) and 42 ($\frac{1}{2}$ cent tax) of Chapter 105 of the N.C. General Statutes. These sales taxes are collected by the N.C. Department of Revenue (Department of Revenue) and redistributed to the County pursuant to statute.

By special local legislation in Chapters 134 and 534 of the 1983 Session Laws, fifty percent (50%) of the Article 39 sales taxes are paid into the County's School Capital Reserve Fund (Capital Reserve Fund) for the purposes of funding school capital projects. The County then distributes the Capital Reserve Fund to the two school districts on an ADM basis. For FYs 1993-95, the County distributed \$2,356,603.00 to the City Schools and \$12,151,749.00 to the County Schools from this fund.

Further, under N.C. Gen. Stat. § 105-487 and N.C. Gen. Stat. § 105-502, respectively, thirty percent (30%) of the Article 40 sales taxes and sixty percent (60%) of the Article 42 sales taxes are restricted for school capital outlay purposes. At all relevant times, the County has appropriated these restricted funds on an ADM basis. For FYs 1993-95, the County distributed restricted funds totaling \$1,717,550.00 to the City Schools and \$8,856,879.00 to the County Schools.

In addition, the citizens of the City Schools district have approved a special ad valorem tax (supplemental tax) in their district to supplement the funds from the State and the County and "thereby operate schools of a higher standard . . ." *See* N.C. Gen. Stat. § 115C-501 (1994). The citizens in the Enka High School attendance area of the County Schools district also approved a supplemental tax; however, this tax was repealed in 1994. For FYs 1993-95, the amount of supple-

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mental taxes levied on behalf of the City Schools was \$6,987,923.00, while the amount levied on behalf of the County Schools was \$772,428.00 (no tax was levied on behalf of the County Schools in FY 1994-95 since the supplemental tax was repealed in 1994).

On a quarterly basis, the Department of Revenue allocates to each taxing county the net proceeds of the sales taxes collected in that county. *See* N.C. Gen. Stat. § 105-472(a) (1995). The net proceeds received by each county from the Department of Revenue, less the restricted portions of the Articles 39, 40 and 42 sales taxes, are referred to as the residual local sales and use taxes (residual sales taxes). It is a portion of these residual sales taxes that are at issue in this case.

Pursuant to N.C. Gen. Stat. § 105-472(b), a county must choose one of two methods for distributing the residual sales taxes—the per capita method or the ad valorem method. Under the per capita method, the residual sales taxes are distributed to each taxing district within the county according to the percentage of the county's population which the taxing district represents. Under the ad valorem method, the residual sales taxes are distributed to each taxing district within the county according to the percentage that the ad valorem taxes levied in the taxing district bears to the total county ad valorem tax levy.

As the trial court correctly noted, if the County had chosen to utilize the per capita method of distribution, they would not have been required to distribute any of the residual sales taxes to the two school districts. However, at all relevant times, the County has elected to utilize the ad valorem method of distributing the residual sales taxes. As a result, for FY 1993-94, the County distributed a total of \$1,427,393.00 of the residual sales taxes to the City Schools and a total of \$326,773.00 to the County Schools. And, for FY 1994-95, the County distributed a total of \$1,400,128.00 of the residual sales taxes to the City Schools and a total of \$332,465.00 to the County Schools.

However, since the supplemental tax in the Enka High School attendance area of the County Schools district was repealed in 1994, the County Schools no longer receive a portion of the residual sales taxes under the ad valorem distribution method. Plaintiffs contend these residual sales tax proceeds should be distributed to the school districts on an ADM basis in accordance with N.C. Gen. Stat. § 115C-430. The parties represent that if the residual sales taxes were distributed to the two schools systems on an ADM basis for FY 1995-

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96, the County Schools would have received additional funds of approximately \$1,200,000.00, their 84% proportionate share of the residual sales taxes.

Plaintiffs' first three assignments of error deal with matters of statutory construction. At the outset, we note that it is well established in this State that legislative intent controls the interpretation of a statute, and when two statutes concern the same subject matter "their provisions are to be reconciled if this can be done by fair and reasonable intendment . . ." *Highway Commission v. Hemphill*, 269 N.C. 535, 538-539, 153 S.E.2d 22, 26 (1967); *see also Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) ("[W]hen statutes 'deal with the same subject matter, they must be construed in *pari materia* and harmonized to give effect to each.' " (*quoting Gravel Co. v. Taylor*, 269 N.C. 617, 620, 153 S.E.2d 19, 21 (1967))). Further, "[i]t is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970). Finally, our Supreme Court has stated that:

Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling; and this is true *a fortiori* when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage.

Food Stores v. Board of Alcoholic Control, 268 N.C. 624, 628-629, 151 S.E.2d 582, 586 (1966).

[1] Plaintiffs first contend that the trial court erred in concluding that N.C. Gen. Stat. § 105-472(b)(2) was not in conflict with N.C. Gen. Stat. § 115C-430. Under the terms of N.C. Gen. Stat. § 105-472(b)(2), which deals with the ad valorem method of distribution, there is a two-tier distribution process. In the first tier, the Department of Revenue allocates the residual sales taxes between the County and its municipalities in proportion to the amounts of ad valorem taxes levied by each during the previous fiscal year, which includes the amounts levied by

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the County on behalf of each of the taxing districts. The second tier involves the County distributing the taxes it receives to the various taxing districts, in proportion to the amount of ad valorem taxes levied on their behalf during the previous fiscal year.

On the other hand, N.C. Gen. Stat. § 115C-430 states, in relevant part:

If there is more than one local school administrative unit in a county, all appropriations by the county to the local current expense funds of the units, except appropriations funded by supplemental taxes levied less than countywide . . . , must be apportioned according to the membership of each unit.

N.C. Gen. Stat. § 115C-430 (1994).

As the trial court found, the two statutes involve different subject matters. The funds which are dealt with in N.C. Gen. Stat. § 105-472(b)(2) concern tax funds which are distributed to the individual taxing districts by the County based on the proportion of ad valorem taxes levied on each taxing district's behalf during the previous fiscal year. Under the express language of the statute, these distributions are mandatory. The County serves merely as a conduit or agent of the taxing district in "passing through" funds which belong to those taxing districts and over which the County has no claim or control. In contrast, N.C. Gen. Stat. § 115C-430 deals with discretionary appropriations by the County to each school district's current expense fund.

Since distribution of the residual sales taxes under N.C. Gen. Stat. § 105-472(b)(2) is dependent upon the levy of ad valorem taxes within a taxing district, it does not appear that it was the intent of the legislature for N.C. Gen. Stat. § 115C-430 to supersede N.C. Gen. Stat. § 105-472(b)(2). Therefore, the trial court properly concluded that the two statutes were not in conflict, and plaintiffs' first assignment of error is overruled.

[2] Plaintiffs' next contention is that the trial court erred by concluding that N.C. Gen. Stat. § 115C-424 (the repealer statute) did not repeal N.C. Gen. Stat. § 105-472(b)(2). The repealer statute states, in relevant part:

It is the intent of the General Assembly by enactment of this Article to prescribe for the public schools a uniform system of

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budgeting and fiscal control. To this end, all provisions of general laws and local acts in effect as of July 1, 1976, and *in conflict with the provisions of this Article* are repealed. . . .

N.C. Gen. Stat. § 115C-424 (1994) (emphasis added). The repealer statute specifically applies only to prior statutes that are in conflict with Article 31 of Chapter 115C of the N.C. General Statutes—the School Budget and Fiscal Control Act. Since N.C. Gen. Stat. § 105-472(b)(2) and N.C. Gen. Stat. § 115C-430 are not in conflict, the trial court did not err in concluding that the repealer statute did not apply in this situation, and this assignment of error is overruled.

[3] Plaintiffs next contend that the trial court erred in concluding that N.C. Gen. Stat. § 115C-430 did not govern distributions of the residual sales taxes to the current expense funds of each school district. As previously stated, if there are two statutes, and one is general and one specific, then the specific statute applies unless a contrary intention exists. *Food Stores v. Board of Alcoholic Control*, 268 N.C. at 628-629, 151 S.E.2d at 586.

N.C. Gen. Stat. § 115C-430 is a general statute dealing with the distribution of county appropriations to multiple school districts within the County. In contrast, N.C. Gen. Stat. § 105-472(b)(2) is a specific statute dealing with the distribution of sales tax proceeds to taxing districts within the County. Therefore, since the specific statute controls, and there appears to be no contrary intention on the part of the legislature, the trial court properly concluded that N.C. Gen. Stat. § 105-472(b)(2) governed distribution of the residual sales taxes, and this assignment of error is overruled.

[4] Plaintiffs' final two assignments of error deal with constitutional issues. Plaintiffs first contend the trial court incorrectly concluded that the ad valorem method of distributing the residual sales taxes under N.C. Gen. Stat. § 105-472(b)(2) was not unconstitutional under the equal protection clause of Article I, Section 19 of the North Carolina Constitution. They argue that the County's failure to distribute the residual sales taxes on an ADM basis results in students in one part of the County having superior resources over students in another part of the County.

Our Supreme Court has recently addressed a similar issue in *Leandro v. State of North Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997), in which it held:

Although we have concluded that the North Carolina Constitution requires that access to a sound basic education be provided

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equally in every school district, we are convinced that the equal opportunities clause of Article IX, Section 2(1) does not require substantially equal funding or educational advantages in all school districts. We have considered the language and history underlying this and other constitutional provisions concerned with education as well as former opinions by this Court. As a result, we conclude that provisions of the current state system for funding schools which require or allow counties to help finance their school systems and result in unequal funding among the school districts of the state do not violate constitutional principles.

Id. at 349, 488 S.E.2d at 256. The Court then concluded that since the equal opportunities clause under Article IX, Section 2(1) of the North Carolina Constitution was not violated, the equal protection clause under Article I, Section 19 likewise was not violated. *Id.* at 352, 488 S.E.2d at 258.

Further, this Court has determined that while students in our public schools have a fundamental right of equal access to education, they do not have a fundamental right to uniform educational opportunities. *See Britt v. N.C. State Board of Education*, 86 N.C. App. 282, 357 S.E.2d 432, *disc. review denied and appeal dismissed*, 320 N.C. 790, 361 S.E.2d 71 (1987). In *Britt*, our Court stated that:

The governing boards of units of local government having financial responsibility for public education are expressly authorized to "use local revenues to add to or supplement any public school or post-secondary school program." N.C. Const., Article IX, § 2(2). Clearly then, a county with greater financial resources will be able to supplement its programs to a greater degree than less wealthy counties, resulting in enhanced educational opportunity for its students. . . . [This] provision[] obviously prelude[s] the possibility that exactly equal educational opportunities can be offered throughout the State.

Id. at 288, 357 S.E.2d at 435-436. Again, the *Leandro* court agreed, stating that:

[A]s the North Carolina Constitution so clearly creates the likelihood of unequal funding among the districts as a result of local supplements, we see no reason to suspect that the framers intended that substantially equal education opportunities beyond the sound basic education mandated by the Constitution must be available in all districts.

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Leandro v. State of North Carolina, 346 N.C. at 350, 488 S.E.2d at 256.

After an extensive review of the record and applying the guiding principles set forth by our courts, we find that the trial court did not err in concluding that the evidence presented in this case fails to establish that the students in the County Schools have been denied equal access to a sound basic education in violation of equal protection principles, and we therefore overrule this assignment of error.

[5] Lastly, plaintiffs contend that since they have been denied equal access to education due to the County's failure to distribute the residual sales taxes on an ADM basis, they have also been denied due process of law under Article I, Section 19 of the North Carolina Constitution, which is synonymous with the requirement of due process under the Fourteenth Amendment to the United States Constitution. *In re Petition of Kermit Smith*, 82 N.C. App. 107, 109, 345 S.E.2d 423, 425 (1986).

Since the evidence presented in this case fails to establish that plaintiffs have been deprived of equal access to the sound basic education which they are guaranteed by the N.C. Constitution, the trial court did not err in concluding that the evidence also fails to establish that plaintiffs have been deprived of due process under Article I, Section 19 of the N.C. Constitution, and therefore this assignment of error is overruled.

In conclusion, we find that the trial court did not err in concluding that plaintiffs have failed to establish that they are entitled to the relief requested in their complaint, and we therefore affirm the judgment entered in favor of defendants and intervenor-defendant.

Affirmed.

Judge WYNN dissents.

Judge SMITH concurs.

Judge WYNN dissenting:

I agree with the Buncombe County Board of Education and the plaintiffs in this case that the residual sales tax should be distributed on a more equitable basis such as the ADM method under § 115C-430 rather under the ad valorem method under § 105-472.

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It appears to me that § 105-472 contemplated the imposition of a county-wide ad valorem tax, and therefore a distribution of the residual sales tax under that method would allow for a proportionate division of the residual sales tax to everyone. However, Buncombe County's school district has the nearly unique feature of having two school districts in which one self-imposes a supplemental tax and the other chooses not to. Thus, in this case, one district receives all of the residual tax that is generated from sources other than the self-imposed tax to the complete exclusion of the other. That's not fair!

First, I would find that § 105-472 is in conflict with § 115C-430 and is therefore controlled by the repealer statute of § 115C-424. The repealer statute specifically repeals statutes like § 105-472 that conflict with provisions under Article 31 of Chapter 115C.

Second, I would find that this case is not controlled by our Supreme Court's recent decision in *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) because in this case, the city schools receive not only the self-imposed supplemental tax but also, to the exclusion of the county schools, the proceeds from a bonus tax. As a result of the County's failure to distribute that bonus tax—the residual sales tax—on an ADM basis, the students in one part of Buncombe County have superior resources over students in another part of the county. Thus, unlike *Leandro* which addressed only supplemental funding, the additional advantage of this bonus tax in this case is evidence that the students in the county schools are being denied equal access to a sound basic education. I must therefore, dissent.

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[128 N.C. App. 226 (1998)]

THE HOME INDEMNITY COMPANY, THE HOME INSURANCE COMPANY, AND CITY INSURANCE COMPANY, PLAINTIFFS v. HOECHST CELANESE CORPORATION; AETNA CASUALTY & SURETY COMPANY; AIU INSURANCE COMPANY; ALL-STATE INSURANCE COMPANY; AMERICAN CENTENNIAL INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; AMERICAN MOTORIST INSURANCE COMPANY; AMERICAN PROFESSIONALS INSURANCE COMPANY; AMERICAN RE-INSURANCE COMPANY; ASSOCIATED INTERNATIONAL INSURANCE COMPANY; BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA; CALIFORNIA UNION INSURANCE COMPANY; CENTENNIAL INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYDS LONDON AND CERTAIN LONDON MARKET INSURANCE COMPANIES; CERTAIN UNDERWRITING SYNDICATES OF THE ILLINOIS INSURANCE EXCHANGE; CERTAIN UNDERWRITING SYNDICATES OF THE INSURANCE EXCHANGE OF THE AMERICAS; CIGNA INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; COMMERCIAL UNION INSURANCE COMPANIES; CONTINENTAL CASUALTY COMPANY; CONTINENTAL INSURANCE COMPANY; CRUM & FORSTER INSURANCE COMPANY; EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY; EMPLOYERS MUTUAL CASUALTY COMPANY; ERIC REINSURANCE COMPANY; EXCESS INSURANCE COMPANY, LIMITED; FEDERAL INSURANCE COMPANY; FIREMAN'S FUND INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY; FREMONT INDEMNITY INSURANCE COMPANY; GIBRALTAR CASUALTY COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY (GEICO); HARBOR INSURANCE COMPANY; HARTFORD ACCIDENT AND INDEMNITY COMPANY; HIGHLANDS INSURANCE COMPANY; HUDSON INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; INTERNATIONAL SURPLUS LINES INSURANCE COMPANY; LEXINGTON INSURANCE COMPANY; LONDON GUARANTEE AND ACCIDENT COMPANY OF NEW YORK; LUMBERMEN'S MUTUAL CASUALTY INSURANCE COMPANY; MEADOWS SYNDICATE, INC.; NATIONAL CASUALTY COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; NEW ENGLAND INSURANCE COMPANY; NEW ENGLAND REINSURANCE COMPANY; NORTH RIVER INSURANCE COMPANY; NORTH STAR REINSURANCE CORPORATION; NORTHWESTERN NATIONAL CASUALTY COMPANY; NORTHWESTERN NATIONAL INSURANCE COMPANY; PACIFIC INSURANCE COMPANY; PROGRESSIVE AMERICAN INSURANCE COMPANY; PRUDENTIAL REINSURANCE COMPANY; ROYAL INDEMNITY COMPANY; SIGNAL INSURANCE COMPANY; ST. PAUL FIRE AND MARINE INSURANCE COMPANY; STONEWALL INSURANCE COMPANY; TORTUGA CASUALTY INSURANCE COMPANY; THE TRAVELERS INDEMNITY COMPANY; TWIN CITY FIRE INSURANCE COMPANY; VIK RE SYNDICATE, INC.; UNDERWRITERS REINSURANCE COMPANY; UNITED INSURANCE COMPANIES, INC.; X.L. INSURANCE COMPANY LIMITED; ZURICH INSURANCE COMPANY; DEFENDANTS

No. COA96-1408

(Filed 6 January 1998)

1. Trial § 67 (NCI4th)—insurer's summary judgment motion—policies and endorsements produced by insured—affidavit by insurer's attorney—estoppel to deny authenticity

The insured was estopped from denying the authenticity of liability policies and endorsements relied upon by the insurer to

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support its motion for summary judgment in an action regarding insurance coverage for pollution clean-up where the policies and endorsements were produced by the insured's broker in response to discovery requests and were attached to the verified affidavit of the insurer's attorney.

2. Trial § 75 (NCI4th)—summary judgment—insurance policies and endorsements—attorney's affidavit—authentication

The verified affidavit of the insurer's attorney stating that insurance policies and endorsements had been produced by the insured and its broker in response to a deposition subpoena *duces tecum* was based on personal knowledge and was sufficient to authenticate the policies and endorsements for summary judgment purposes. N.C.G.S. § 1A-1, Rule 56(e).

3. Insurance § 50 (NCI4th)—general liability insurance—surplus lines carrier—pollution exclusion—prior form approval

A surplus lines insurance carrier was required by N.C.G.S. § 58-3-150 to get prior approval by the Department of Insurance for absolute pollution exclusion clauses in general liability policies issued for a manufacturing plant in this state.

4. Insurance § 895 (NCI4th)—general liability insurance—pollution exclusion clause—use before approval by Department of Insurance—subsequent approval—clause not void

Failure of a surplus lines insurer to get prior approval from the Department of Insurance for absolute pollution exclusions in general liability policies for a polyester manufacturing plant in this state as required by N.C.G.S. § 58-3-150 did not render the pollution exclusions void and unenforceable where the exclusions were not contrary to public policy and were subsequently approved by the Department of Insurance.

5. Insurance § 895 (NCI4th)—general liability insurance—soil and groundwater contamination—exclusion of coverage for clean-up

A clause in a general liability policy excluding coverage for all injury or damage "caused by seepage and/or pollution and/or contamination of air, land, water and/or any other property, however caused and whenever occurring" was enforceable and excluded

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coverage for the investigation and clean-up of contamination of soil and groundwater by pollutants generated by the insured's polyester manufacturing plant.

6. Insurance § 895 (NCI4th)— general liability insurance— pollution exclusion clauses—named peril exceptions— other provisos—coverage not restored

Named peril exceptions to absolute pollution exclusion clauses for fires, explosions, violent discharges, and railroad accidents did not restore coverage by the policies for the investigation and clean-up of contamination of soil and groundwater by pollutants generated by the insured's polyester manufacturing plant, even if occurrences of certain named perils contributed to the contamination, where other provisos in the policies excluded coverage for costs of investigating and remediating environmental contamination.

Appeal by defendant Hoechst Celanese Corporation from order entered 28 August 1996 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 1996.

This appeal concerns insurance coverage for contamination claims under thirteen (13) Lloyds London and Certain London Market Insurance Companies ("Lloyds") general liability policies in effect from 1985-89. The insured, Hoechst Celanese Corporation ("HCC"), obtained the policies at issue from its American insurance broker in New York. The policies were placed pursuant to the surplus lines laws of the State of New York. Lloyds is not admitted or authorized to conduct the business of insurance in the states of North Carolina or New York. For purposes of this appeal which concerns North Carolina sites, the parties agree that North Carolina law applies.

HCC has owned and operated a polyester manufacturing plant in Salisbury, North Carolina, since 1966. Pollutants generated in the normal course of operation have included glycol and Dowtherm. Glycol was disposed of at an on-site treatment plant from 1969 through 1974. HCC has also operated an on-site wastewater treatment plant since 1966. From 1966 through April 1990, the Salisbury plant also disposed of its waste at a nearby off-site landfill known as the Needmore Road landfill.

HCC's manufacturing operations at the Salisbury plant and disposal of waste at the Needmore Road landfill caused degradation of

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soil and groundwater. Glycol and Dowtherm were among the constituent contaminants identified in the groundwater. On 28 April 1988, the State of North Carolina issued two notices of non-compliance to HCC concerning the contamination of groundwater beneath the Salisbury Plant and the Needmore Road landfill. On 6 April 1990, the United States Environmental Protection Agency ("EPA") issued an administrative order directing further cleanup and investigation of the Salisbury Plant site. HCC has also been operating under a state mandate to clean up the contamination at the Needmore Road landfill. HCC seeks to recover the costs of environmental investigation, remediation and cleanup, which aggregate over \$30 million for expenses at the Salisbury Plant and over \$15 million for expenses at the Needmore Road landfill.

HCC filed suit in New Jersey on 14 February 1989 seeking a determination that primary insurance policies issued to HCC cover the claims. On 9 March 1989, The Home Indemnity Company, one of the defendants in the New Jersey case, filed this action in North Carolina seeking a declaratory judgment as to the same insurance policies and claims. In August 1989, this case was stayed to allow the New Jersey case to proceed, but that stay was lifted in December 1992.

On 29 March 1996, defendants Lloyds moved for partial summary judgment concerning claims arising from the site in Salisbury, North Carolina, which consists of the HCC plant in Salisbury as well as the Needmore Road landfill. The motion was based on "absolute pollution exclusions" contained in certain Lloyds' policies. Following a hearing on 23 July 1996, partial summary judgment was entered for defendants on 28 August 1996. The trial court certified the issues raised by defendants' motion for immediate appeal pursuant to G.S. 1A-1, Rule 54(b). HCC appealed on 20 September 1996.

Mendes & Mount, L.L.P., by Henry Lee and Gary P. Schulz, for defendant-appellee Certain Underwriters at Lloyds London and Certain London Market Insurance Companies.

Kilpatrick Stockton, L.L.P., by Jackson N. Steele and Richard E. Morton, for defendant-appellee Certain Underwriters at Lloyds London and Certain London Market Insurance Companies.

Parker, Poe, Adams & Bernstein, L.L.P., by Irvin W. Hankins, III and Josephine H. Hicks, for defendant-appellant Hoechst Celanese Corporation.

Lowenstein, Sandler, Kohl, Fisher & Boylan, by Michael Dore and David Field, for defendant-appellant Hoechst Celanese Corporation.

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EAGLES, Judge.

We first consider whether there was sufficient evidence before the trial court to support Lloyds' motion for summary judgment. HCC argues that summary judgment was not appropriate because there were genuine issues of material fact concerning what exclusion language was included in the policies and when that language became effective. HCC contends that as the moving party, Lloyds had the burden of putting into evidence the insurance policies relied upon, and that Lloyds failed to meet this burden. First, HCC maintains that the only evidence of the insurance policy language filed with Lloyds' motion for summary judgment was contained in Lloyds' own interrogatory responses, each answered upon "information and belief." HCC contends that affidavits based upon "information and belief" must be disregarded because affidavits in support of a motion for summary judgment must be made on personal knowledge. *See G.S. 1A-1, Rule 56(e); Blackwell v. Massey*, 69 N.C. App. 240, 316 S.E.2d 350 (1984); *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E.2d 208 (1972). Second, HCC contends that Lloyds' attempt to get the policies admitted based on attorney's affidavits failed to meet the standards of Rule 56 because the policies were not authenticated by anyone with personal knowledge. In addition, HCC contends that the papers submitted by Lloyds created genuine issues of material fact concerning the exact policy language relied on in Lloyds' motion. HCC argues that one policy relied upon by Lloyds, policy no. UVA0194, has two different overlapping pollution exclusion endorsements. Other policies include endorsements containing pollution exclusions dated three years after the policies expired. Accordingly, HCC argues that because genuine issues of material fact remain, summary judgment was erroneously granted.

Lloyds argues that it met its burden of proof because their motion for summary judgment was initially supported by sworn answers to interrogatories and later by the actual policies containing the specific policy language found in the sworn answers to interrogatories. The policies were attached to the verified supporting affidavit of attorney Henry Lee, Lloyds' attorney. Lloyds argues that this affidavit was based upon personal knowledge because the affidavit explains that the attached policies were produced by HCC and its insurance broker during discovery in this same lawsuit and that their attorney, Henry Lee, clearly would have personal knowledge of documents produced by HCC and its insurance broker in response to a deposition subpoena *duces tecum*. Accordingly, Lloyds contends that the supporting

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affidavit of attorney Henry Lee was competent evidence and sufficient to authenticate the policies. Furthermore, Lloyds argues that the Lee affidavit was timely filed and that HCC never objected to or moved to strike the affidavit. Additionally, Lloyds contends that there was no issue regarding the effective dates of the endorsements on policy no. UVA0194 because the effective dates of the two endorsements are different and do not overlap. Finally, Lloyds argues that HCC is estopped from denying the authenticity of policies which HCC itself produced in discovery in this very case. Accordingly, Lloyds maintains that summary judgment was properly granted.

HCC's argument centers around three policies: UVA0194, NTC344 and NTC345. HCC first points to Policy No. UVA0194, which covers the period of 1 May 1987-1 May 1990. HCC claims that there are genuine issues concerning the exact language of the policy, as there are endorsements with overlapping coverage. UVA0194 contains two Category II pollution exclusions. The first exclusion, listed as Endorsement No. 1, contains provisos which operate to bar coverage during the policy's first year (May 1987-May 1988) for the pollution claims at issue here. However, the policy also contains a second endorsement, No. 27, which amends the policy effective 1 May 1988. Endorsement No. 1 in the policy was effective for the first year of the policy, while Endorsement No. 27 was effective for the remaining two years of the policy. The dates are clear and do not overlap.

The next issue was whether Endorsement No. 27 to policy no. UVA0194 contained a proviso precluding coverage for the environmental claims at issue here. The policy copy attached to Henry Lee's affidavit included in the original record on appeal did not include such a proviso. In response to an order of this court, the Clerk of Superior Court of Mecklenburg County has supplemented the record on appeal and certified to us a true copy of the proviso contained in the trial court's record. Accordingly, the record on appeal now includes proviso (a) to Endorsement No. 27 of policy no. UVA0194 which purports to preclude coverage for the environmental claims at issue here.

HCC next argues that genuine issues of material fact remain concerning policy numbers NTC344 and NTC345. Those policies ended in 1986, but contain pollution exclusions dated in 1989, after the initial New Jersey lawsuit in this case was filed. HCC questions whether these endorsements were actually part of the policies, and if so, when did they go into effect.

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[1],[2] HCC's arguments are unpersuasive. HCC is estopped from denying the authenticity of the policies and their endorsements because these policies were produced by HCC's insurance broker in response to discovery requests in this case. In this record, the policies and endorsements are attached to the verified affidavit of Lloyds' attorney in this case who explained that the policies had been produced by HCC and its insurance broker in response to a deposition subpoena *duces tecum*. This affidavit was based on personal knowledge and satisfies Rule 56(e). *See Lockwood v. Wolf Corp.*, 629 F.2d 603, 611 (9th Cir. 1980). Accordingly, the trial court properly considered the exclusions as authentic and as part of the policy. The endorsements clearly state that they are "effective" from "inception." Accordingly, there is no genuine issue of material fact and summary judgment as to policy numbers NTC344 and NTC345 was properly granted.

HCC appears to raise no issues concerning the language of the remaining policies. Lloyds met its burden of proof concerning these policies and summary judgment was appropriately granted.

We next consider whether the absolute pollution exclusions contained in policies issued prior to approval by the North Carolina Department of Insurance are enforceable. The North Carolina Department of Insurance approved absolute pollution exclusions on 24 February 1986. Five of Lloyds' policies issued prior to this date contain an "absolute pollution exclusion." HCC first argues that Lloyds is subject to Chapter 58 because they insured property interests in North Carolina. *See G.S. 58-3-5*. Accordingly, HCC contends that Lloyds was required to comply with 58-3-150 which states that "[i]t is unlawful for any insurance company doing business in this State to issue ... any policy ... until the forms of the same have been submitted to and approved by the Commissioner [of Insurance of North Carolina]." HCC maintains that Lloyds was doing business in this state, as defined by G.S. 58-16-35, by issuing a contract of insurance to a corporation licensed to do business in North Carolina and collecting premiums for the contracts. HCC argues that Lloyds failed to comply with G.S. 58-3-150 when it inserted the unapproved absolute pollution exclusion in policies issued to HCC.

HCC next argues that because Lloyds did not comply with G.S. 58-3-150, the unapproved language should be void. First, HCC contends that portions of contracts that violate statutes are against public policy and should be null and void. Furthermore, they contend that

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the statute's purpose is to protect insureds and should be strictly construed. HCC points out that other jurisdictions hold similar unapproved language void. Finally, HCC argues that the dicta from *Blount v. Royal Fraternal Ass'n*, 163 N.C. 167, 79 S.E.2d 299 (1913), relied upon by Lloyds, is distinguishable because the court in *Blount* ruled on a purely evidentiary basis, holding that the plaintiff failed to carry its burden of proof that the Insurance Commissioner had not approved the policy.

Lloyds first contends that the Surplus Lines Act, G.S. 58-21-1 *et seq.* exempts surplus lines carriers, such as Lloyds, from supervision by the North Carolina Department of Insurance and that prior approval of the policy was not necessary. See G.S. 58-21-50. Lloyds alternatively argues that even if the policies were required to be approved in advance, Lloyds' failure to obtain the required approval does not invalidate the clause. See *Blount*. Lloyds also maintains that the absolute pollution exclusion at issue is not contrary to the public policy of the State of North Carolina as evidenced by the fact that the language was ultimately approved by the Department of Insurance. Finally, Lloyds maintains that the contracts should be enforced as written, because the premium and risks which the policies were intended to cover were negotiated between the parties and the carefully negotiated policy should not be rewritten to allow HCC to reap a windfall and to secure far greater protection than it paid for.

[3],[4] We hold that Lloyds' failure to get advance form approval does not result in the absolute pollution exclusion being void. G.S. 58-3-5 states that insurance companies covering risks in this State must comply with Chapter 58. Nowhere in Article 21 (the Surplus Lines Act) are surplus lines carriers expressly exempted from the regulation of Chapter 58. Accordingly, 58-3-150 applies and Lloyds was required to get form approval from the Department of Insurance. However, despite Lloyds' failure to get form approval of the absolute pollution exclusions, their failure to get approval does not result in the exclusions being void. Nowhere does G.S. 58-3-150 declare that all unapproved policy provisions are void and unenforceable. In fact, the General Assembly specifically provided for penalties for violations of Chapter 58 in G.S. 58-2-70 and G.S. 58-3-100. G.S. 58-3-100 grants the Commissioner the power to revoke, suspend, or refuse to renew the license of any insurer. G.S. 58-2-70 provides for monetary fines and restitution. Voiding of the policy is not provided for by statute. Furthermore, the dicta in *Blount* is persuasive. *Blount* interpreted a

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predecessor statute to G.S. 58-3-150. While the court in *Blount* did rule on a purely evidentiary basis, the court also addressed the issue of unapproved policy language. The court determined that even if the Insurance Commissioner had not approved the policy, “we would not give our assent to the position of the plaintiff that this would avoid the effect of the provision stamped on the certificate, leaving other parts of the certificate in force.” *Id.* at 170. The court further noted that “[t]he statute does not purport to deal with the validity of the contract of insurance, but with the insurance company.” *Id.*

Other jurisdictions addressing the issue of whether unapproved language should be voided have reached similar conclusions. In *F.D.I.C. v. American Cas. Co. of Reading, Pa.*, 975 F.2d. 677 (10th Cir. 1992), the court opined that “[v]oidance of [an] exclusion to an insurance policy is a severe penalty which alters the very terms of the deal between the parties. It requires the insurer to provide coverage for uncontracted risk, coverage for which the insured has not paid.” *Id.* at 683. The dicta in *Blount* and the reasoning of *Reading* are persuasive in the context of this litigation.

We note that the pollution exclusion at issue is not contrary to the public policy of the State of North Carolina, as evidenced by its subsequent approval for use by the Department of Insurance. In holding that the unapproved form here is not void, we do not address the situation where an unapproved form is never submitted for approval or is subsequently rejected for use by the Department of Insurance. Accordingly, we hold that the absolute pollution exclusion at issue in this case is not contrary to public policy and the policies should be enforced as written including the pollution exclusion language.

We next consider whether the policies' exceptions to the Lloyds' policies' pollution exclusion provisions render those pollution exclusions inapplicable to the Salisbury site. The pollution exclusion in the policies at issue contain so-called “named peril exceptions” for fire, explosions, violent discharges and railroad accidents. HCC maintains that occurrences of these named perils contributed to contamination at the Salisbury plant and accordingly should restore coverage. Furthermore, HCC contends that proviso no. 5 in policy nos. NTC341, UVA0194 (Endorsement No. 1), UVA0195, UVA0201 and NTC145/UVA0270 precluding coverage for cleanup costs do not apply to groundwater contamination because groundwater is not “property . . . owned . . . by the Insured or under the control of the Insured.” See *C.D. Spangler Constr. Co. v. Industrial Crankshaft and En-*

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gineering Co., Inc., 326 N.C. 133, 146, 388 S.E.2d 557, 565 (1990) (groundwater is a state resource).

Lloyds argues that the so-called “Category I” absolute pollution exclusions “clearly and unambiguously” deny coverage for liability caused by seepage, pollution, or contamination. Lloyds further contends that, assuming *arguendo* that the named peril events took place, the provisos to the absolute pollution exclusion in the policies containing the so-called “Category II” absolute pollution exclusion apply to deny coverage for all costs of investigating and remediating environmental contamination. Further, Lloyds argues that HCC has not forecast evidence that named peril events took place and caused appreciable damage. *See Highlands Ins. Co. v. Aerovox Inc.*, 424 Mass. 226, 676 N.E.2d 801 (Mass. 1997).

[5] There are two types of absolute pollution exclusions in the policies involved in this appeal. The first type, what Lloyds labels as Category I exclusions, exclude insurance coverage for all injury or damage “caused by seepage and/or pollution and/or contamination of air, land, water and/or any other property, however caused and whenever occurring.” The Category I exclusion applies based on its plain language, and HCC does not contest its applicability. The exclusion should be enforced. We hold that summary judgment on the basis of the Category I exclusion was properly granted as to those policies containing the Category I exclusion (policy nos. NTC342, NTC343, NTC344, NTC345, NTD146/UVA0271, NTD147/UVA0272).

[6] The second type of exclusion, labeled Category II by Lloyds, is similar to the Category I exclusion but in addition to the absolute pollution exclusion the Category II exclusions also contain certain exceptions and provisos. The exclusions restore coverage upon the happening of a named-peril, such as fire or explosion. However, the provisos in these policies prevent the exclusions from restoring coverage. Policy Nos. UVA0146, UVA0149 and UVA0194 (Endorsement No. 27) contain proviso (a) which states that the policy does not apply to any claim relating to “any liability to test for, monitor, clean-up, remove, contain, treat, detoxify or neutralize Pollutants” Policy nos. NTC341, UVA0195, UVA0201, and NTD145/UVA0270 also contain provisos which operate to deny restoration of coverage. Proviso No. 3 bars coverage “arising out of any site or location used . . . for the handling, processing, treatment, storage, disposal, or dumping of any waste materials or substances.” Proviso No. 4 bars coverage “for the cost of evaluating or monitoring or controlling seep-

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ing or polluting or contaminating substances." HCC's argument that proviso No. 5 does not apply here because this is groundwater contamination is not determinative because proviso nos. 3 and 4 do apply here. Claims relating to the Salisbury Plant and the Needmore Road landfill are clearly barred by these provisos. Accordingly, the Category II absolute pollution exclusions in policy nos. UVA0146, UVA0149, UVA0194, NTC341, UVA0195, UVA0201, and NTD145/ UVA0270 should be enforced and summary judgment was properly granted.

In conclusion, we hold that there were no genuine issues of material fact and that summary judgment was properly granted. The policies should be enforced as written because unapproved policy language which is subsequently approved for use will not be declared void. Therefore, the absolute pollution exclusions apply and operate to deny coverage for the contamination claims at issue. Accordingly, we hold that summary judgment should be affirmed.

Affirmed.

Judges WYNN and MARTIN, Mark D., concur.

STATE OF NORTH CAROLINA v. COSMO CAPORASSO

No. COA97-172

(Filed 6 January 1998)

1. Evidence and Witnesses § 402 (NCI4th)—in-court identifications—absence of pretrial identifications—observations of witnesses

Three witnesses were properly permitted to make in-court identifications of defendant without first being required to submit to other nonsuggestive identification procedures where none of the witnesses participated in pretrial identifications, and their identifications of defendant were based solely upon their observations of defendant at times and locations relating to the crimes charged.

2. Criminal Law § 413 (NCI4th Rev.)—testimony about threats by defendant—denial of recess to investigate

The trial court did not err by allowing a witness to testify about threats made by defendant the evening before the trial

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without granting defendant's motion for a recess to investigate this allegation and to question bailiffs who purportedly witnessed defendant making the threats where defendant had time at other recesses to interview the bailiffs; defendant could have called the bailiffs to the stand or recalled the witness for further cross-examination after investigating the alleged threats by defendant; and defendant's motion for a recess was not based on a constitutional right and was properly within the trial court's discretion.

3. Criminal Law § 103 (NCI4th Rev.)— statement of defendant—discovery—additional testimony supporting disclosed statement

A witness was not permitted to testify in violation of the discovery statute where the State revealed the substance of an oral statement made by defendant to the witness in which defendant offered to pay the witness if he would plead guilty to robberies for which defendant was charged, and the witness's additional testimony that defendant admitted he wore a hat or bandanna and carried a gun during the robberies simply supported the statements disclosed in discovery. N.C.G.S. § 15A-903(a)(2).

4. Jury § 260 (NCI4th)— peremptory challenges—lack of attention and maturity—no Batson violation

The trial court did not err by allowing the State to peremptorily challenge two African-American prospective jurors where the prosecutor stated that one juror was excused because she seemed bored with the proceedings and exhibited a general lack of attention and that the second juror was excused due to his young age and lack of maturity.

Appeal by defendant from judgments entered 9 August 1996 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 18 November 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Robert O. Crawford, III, for the State.

John Bryson for defendant-appellant.

MARTIN, Mark D., Judge.

Defendant appeals from judgments entered upon a jury verdict of guilty of three counts of robbery with a dangerous weapon.

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Defendant received two sentences of 126 months to 161 months and one sentence of 101 months to 131 months, to run consecutively.

At trial, the State's evidence tended to show that on 30 June 1995, three men entered Food Rite Grocery on Highway 62 in Climax, North Carolina. James Wall, a Pepsi-Cola sales representative, was present in the store setting up a display before closing when he observed three white males walking around the store. One of the males, which Wall identified at trial as defendant, asked Wall where the bathroom was. Before leaving the parking lot, Wall observed the three men, including defendant, leave the building from the front entrance. Wall saw James Clinton Smith, the store manager, lock the store and walk to his car.

Once Smith was in his car, he was robbed at gunpoint by two white males and one black male. Although unable to make a positive identification, Smith stated defendant looked similar to one of his assailants.

On 31 July 1995 a second robbery occurred at Bojangle's Restaurant on East Bessemer Avenue in Greensboro, North Carolina. Specifically, Michael Damon, the assistant manager, was accosted by two armed men wearing bandanas who stole \$2,100 after forcing Damon to open the restaurant's safe. During the police investigation, Damon selected defendant and the co-defendant, Charles Pegram, from photo arrays as the robbers. He also identified defendant at trial.

Similarly, on 3 August 1995 at 6:00 a.m., two white males entered Bojangle's Restaurant on South Main Street in High Point, North Carolina and asked Keimarscha Fitzgerald, the cashier, where the bathroom was located. The men returned to the front of the store wearing bandannas. One of the men remained in the front of the store and the other man forced Ken Underwood, the manager, to open the safe and stole \$579 in a red bank bag. Perry Connard, a customer, followed the two men and saw them enter a blue BMW driven by a black male. Connard noted the car had a temporary tag with license number 1811803.

At trial, Fitzgerald stated she observed the two men without their masks for a few seconds when they first entered the store. Moreover, at trial, she positively identified defendant as one of the robbers.

On 3 August 1995 at approximately 6:30 to 7:00 a.m., Sheila Fields of Greensboro noticed a blue BMW with a temporary tag in her apartment complex. In addition, she observed two white males and one

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black male sitting in the car. When Fields returned to her apartment, she discovered a red bank bag near the entrance of the parking lot, which she later turned over to the police. At trial, Fields identified defendant as one of the passengers in the BMW.

In addition to the above eye-witness identifications offered at trial, Kenneth Moody, after initially refusing to testify, testified defendant threatened him on the evening before trial. Moreover, Moody stated defendant offered him \$18,000 and a gold chain if Moody pled guilty to the crimes charged against defendant.

On appeal, defendant contends the trial court erred by (1) allowing James Wall, Keimarsa Fitzgerald, and Sheila Fields to make in-court identifications of defendant; (2) allowing Kenneth Moody to testify to threats made by defendant without granting defendant's motion for a recess to investigate these claims; (3) allowing the State to introduce evidence in violation of the discovery statute; and (4) allowing the prosecutor to exercise peremptory challenges to exclude African-American jurors.

I.

[1] Defendant contends the trial court erred by allowing James Wall, Keimarsa Fitzgerald, and Sheila Fields to make in-court identifications of defendant without first requiring them to submit to other non-suggestive identification procedures.

“Generally, a witness may make an in-court identification of a defendant and any uncertainty in that identification goes to the weight and not the admissibility of the testimony.” *State v. Miller*, 69 N.C. App. 392, 396, 317 S.E.2d 84, 87-88 (1984). “An in-court identification is . . . competent where the in-court identification is based on the witness’ observations at the time and scene of the crime.” *Id.* at 396, 317 S.E.2d at 88. Pre-trial identifications are not necessary for in-court identifications to be admissible. *State v. Tyson*, 278 N.C. 491, 496, 180 S.E.2d 1, 4 (1971).

While in-court identifications are generally admitted, they may be excluded if “tainted by a prior confrontation in circumstances shown to be ‘unnecessarily suggestive and conducive to irreparable mistaken identification.’” *Miller*, 69 N.C. App. at 396, 317 S.E.2d at 88 (quoting *State v. Covington*, 290 N.C. 313, 324, 226 S.E.2d 629, 638 (1976)). However, “viewing [] a defendant in the courtroom during the various stages of a criminal proceeding by witnesses who are offered to testify as to identification of the defendant is not, of itself, such a

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confrontation as will taint an in-court identification . . ." *Covington*, 290 N.C. at 324, 226 S.E.2d at 638. See *State v. Haskins*, 278 N.C. 52, 57, 178 S.E.2d 610, 612 (1971).

In the present case, the in-court identifications by Wall, Fitzgerald, and Fields were properly admitted. Although the jury may give different weight to each witness' testimony based on the reliability of each identification, in-court identifications, which are not tainted by unnecessarily suggestive pre-trial confrontations, are admissible. *Miller*, 69 N.C. App. at 396, 317 S.E.2d at 87-88. Since none of the above witnesses participated in pre-trial identifications, their testimonies, as noted by the trial court, were "unimpaired by any constitutionally defective pre-trial identification procedure[s]."

Moreover, the identifications by Wall, Fitzgerald, and Fields were based solely on their observations of defendant at times and locations relating to the crimes. As a result, the trial court properly determined their testimony was competent.

Specifically, Wall observed defendant in Food Rite Grocery on 30 June 1995 when defendant entered the store with two other males. In addition to observing defendant moving through the store, defendant asked Wall to direct him to the bathroom. Although Wall did not observe defendant rob the store manager in the parking lot, Wall did see defendant and his companions exit the store immediately before the store manager. Moreover, Wall's description of defendant matches the store manager's description of the individual who accosted him.

Fitzgerald, who worked as a cashier in Bojangle's on 31 July 1995, testified defendant entered the store and then requested to use the bathroom. Subsequently, Fitzgerald observed defendant reappear with a red bandana covering his face. For two to three minutes, defendant remained at the front of the store where Fitzgerald continued to view him.

Early on the morning of 3 August 1995, Fields noticed three men sitting in a blue BMW in the parking lot of her apartment complex. As Fields walked to her car, she observed a white male in the front passenger seat whom she identified at trial as defendant.

Since none of the witnesses' testimony was tainted by unnecessarily suggestive pre-trial identification procedures and each witness had some basis for identifying defendant, the trial court did not err by allowing the in-court identifications. Accordingly, defendant's contentions are without merit.

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II.

[2] Defendant next contends the trial court erred by allowing Kenneth Moody to testify to threats made by defendant without granting defendant's motion for a recess to investigate these claims.

"A motion for a continuance is ordinarily addressed to the sound discretion of the trial court. Therefore, the ruling is not reversible on appeal absent an abuse of discretion." *State v. Smith*, 310 N.C. 108, 111, 310 S.E.2d 320, 323 (1984). An abuse of discretion is defined as a decision "manifestly unsupported by reason," *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985), or "so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

When "a motion to continue is based on a constitutional right, then the motion presents a question of law which is fully reviewable on appeal." *State v. Jones*, 342 N.C. 523, 530-531, 467 S.E.2d 12, 17 (1996) (citing *State v. Smith*, 310 N.C. 108, 111, 310 S.E.2d 320, 323 (1984)). To establish that a motion to continue is based on a constitutional right, defendant must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986).

In the present case, the trial court did not err in failing to grant defendant's motion for a recess. At trial, Moody initially refused to testify but agreed to testify after being cited for contempt. Before testifying, Moody informed the trial court he was threatened by defendant on the evening before trial. Subsequently, the trial court found Moody had been threatened by defendant. Defendant then moved for a brief recess to investigate the allegations and question the bailiffs who, according to Moody, witnessed defendant making threats.

Although the trial court denied the motion for a recess, defendant had sufficient time before the end of trial to investigate Moody's claims and prevent material prejudice to defendant. Specifically, defendant had time at other recesses to interview the bailiffs who possibly witnessed defendant's threats to Moody. Moreover, defendant could have called the bailiffs to the stand or recalled Moody for further cross-examination after investigating the alleged threats by defendant.

Because defendant has not shown how he would have been better prepared or proved material prejudice by the trial court's denial of

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his request, his motion for a recess was not based on a constitutional right and was properly within the trial court's discretion. Accordingly, defendant's contention is without merit.

III.

[3] Defendant next contends the trial court erred by allowing the State to introduce evidence in violation of the discovery statute. More particularly, defendant argues that Kenneth Moody's testimony at trial exceeded the statements previously revealed to defendant through discovery.

Pursuant to N.C. Gen. Stat. § 15A-903(a)(2), the prosecution, upon motion of defendant, must "divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant, . . . within the possession, custody, or control of the State" N.C. Gen. Stat. § 15A-903(a)(2) (1988). "As used in the statute, 'substance' means: 'Essence; the material or essential part of a thing' " *State v. Bruce*, 315 N.C. 273, 280, 337 S.E.2d 510, 515 (1985) (citing BLACK'S LAW DICTIONARY 1280 (rev. 5th ed. 1979)).

Where a party has failed to comply with the discovery statute, N.C. Gen. Stat. § 15A-903, the trial court may, in its discretion, issue sanctions. *State v. Alston*, 307 N.C. 321, 330, 298 S.E.2d 631, 639 (1983). Sanctions imposed for discovery violations will not be reversed absent a showing of abuse of discretion. *Id.*

In the present case, the prosecution revealed the substance of the oral statement made by defendant to Moody. While defendant and Moody were in jail, defendant offered Moody \$18,000 and a gold chain if Moody pled guilty to the crimes charged against defendant. At trial, when the prosecution asked Moody what the defendant discussed with him, Moody stated defendant wanted him to plead guilty to five robberies, including the robberies of the Bojangle's Restaurants in High Point and Greensboro. According to Moody, defendant admitted he wore either a hat or a bandanna during the robberies and carried a 9mm gun or a revolver.

The prosecution did not violate the discovery statute because the substance of the defendant's statements was disclosed. Specifically, defendant's statements revealed he wanted Moody to "take the wrap (sic)" for him. To successfully plead guilty to crimes he did not commit, Moody would need to know specifics of the crimes. The additional statements Moody attributed to defendant simply supported

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the statements disclosed in discovery. Accordingly, the trial court's ruling was not arbitrary and capricious and defendant's contentions are without merit.

IV.

[4] Finally, defendant contends the trial court erred by allowing the prosecutor to exercise peremptory challenges to exclude African-American jurors.

Article I, Section 26 of the Constitution of North Carolina and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibit using peremptory challenges to exclude jurors based solely on their race. *State v. Glenn*, 333 N.C. 296, 301, 425 S.E.2d 688, 692 (1993).

In *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), modified, *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the United States Supreme Court created a three-pronged analysis to use when determining whether a prosecutor impermissibly excluded prospective jurors because of their race. *State v. Kandies*, 342 N.C. 419, 434, 467 S.E.2d 67, 74, *cert. denied*, 117 S. Ct. 237, 136 L. Ed. 2d 167 (1996). First, to establish a *prima facie* case of discrimination, a criminal defendant must demonstrate that the prosecutor exercised peremptory challenges on the basis of race. *Id.* Second, to rebut the defendant's *prima facie* showing, the prosecution must "articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group." *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988), *cert. denied*, 490 U.S. 1110, 109 S. Ct. 3165, 104 L. Ed. 2d 1027 (1989). Ultimately, the trial court must determine whether the defendant has satisfied his burden of proving intentional discrimination. *Kandies*, 342 N.C. at 434, 467 S.E.2d at 75.

In examining the prosecution's explanations for excluding prospective jurors, the appellate court should not overturn the trial court's findings unless the appellate court is "convinced that its determination was clearly erroneous." *Hernandez v. New York*, 500 U.S. 352, 369, 111 S. Ct. 1859, 1871, 114 L. Ed. 2d 395, 412 (1991). "[E]valuation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'" *State v. Robinson*, 336 N.C. 78, 94, 443 S.E.2d 306, 313 (1994) (citing *Hernandez*, 500 U.S. at 365, 111 S. Ct. at 1869, 114 L. Ed. 2d at 409).

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In the present case, after the jury was empaneled, the trial court found defendant had made a *prima facie* case of racial discrimination in the exercise of the prosecution's peremptory challenges. As a result, the trial court required the prosecution to present its reasons for the exclusion of two African-American jurors. Specifically, the prosecution maintained it excluded juror Mitchell because she "seemed . . . bored with the proceedings" and exhibited "a general lack of attention." The prosecution also excused juror Crawford due to his young age and lack of maturity.

When, as here, a juror displays a lack of attention, the prosecution may use a peremptory challenge to excuse the juror from service. *See Robinson*, 336 N.C. at 96, 443 S.E.2d at 314. Similarly, the prosecution may seek jurors who are stable and mature, *State v. Jackson*, 322 N.C. 251, 257, 368 S.E.2d 838, 840 (1988), cert. denied, 490 U.S. 1110, 109 S. Ct. 3165, 104 L. Ed. 2d 1027 (1989), and exclude those "who do not appear to understand legal rules." *State v. Porter*, 326 N.C. 489, 499, 391 S.E.2d 144, 151 (1990). As a result, the trial court did not err by allowing the prosecution to remove jurors Mitchell and Crawford from the jury. Accordingly, defendant's contentions are without merit.

No error.

Judges EAGLES and WYNN concur.

STATE OF NORTH CAROLINA v. MICHAEL J. RAYNOR, DEFENDANT

No. COA97-98

(Filed 6 January 1998)

1. Kidnapping and Felonious Restraint § 28 (NCI4th)—indictment alleging restraint—instruction on restraint or confinement—no error

There was no error in the trial court's instruction that defendant could be found guilty of first-degree kidnapping based upon "restraint or removal" when the indictment alleged only a theory of kidnapping based upon restraint of the victim since unlawful removal from one place to another must involve unlawful restraint, and the evidence at trial supported conviction under both the removal and restraint theories.

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2. Kidnapping and Felonious Restraint § 18 (NCI4th)— element of restraint—removal not inherent in robbery

There was sufficient evidence of the element of restraint for submission of a charge of kidnapping to the jury in that the evidence showed more than a mere technical asportation inherent in the commission of an armed robbery where defendant and his accomplice first moved the victim to a bedroom to take money in his wallet and then moved him to the kitchen where they attempted to tie him up.

3. Kidnapping and Felonious Restraint § 14 (NCI4th)— perpetrators fleeing scene—no release in safe place

A kidnapping victim was not released in a safe place so that the charge was raised to first-degree kidnapping where defendant and his accomplice fled the scene when they were overpowered by the victim as they attempted to tie him up with electrical cords.

4. Larceny § 220 (NCI4th)— possession of stolen property— knowledge property was stolen

There was sufficient evidence that defendant knew or had reasonable grounds to believe that a gun in his possession was stolen so as to support submission of a charge of felonious possession of stolen property to the jury where defendant's accomplice testified defendant told him that the gun was stolen, and the owner testified that the gun had been stolen from his home.

Appeal by defendant from judgments entered 30 August 1996 by Judge James E. Ragan, III. Heard in the Court of Appeals 19 November 1997.

Attorney General Michael F. Easley, by Assistant Attorney General John J. Aldridge, III, for the State.

Joseph E. Stroud, Jr. for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant Michael J. Raynor was indicted for robbery with a dangerous weapon, first degree kidnapping, felonious possession of stolen goods, and possession of a firearm by a felon on 28 May 1996. This matter came on for hearing before Judge James E. Ragan, III and a duly empaneled jury during the 26 August 1996 criminal session of Onslow County Superior Court.

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The State's evidence tended to show that on 20 January 1996, when Frank Mordica, Jr. responded to a ringing doorbell at his residence in Jacksonville, North Carolina, two men shoved a 9 millimeter handgun into Mordica's face and ordered him back into the house. The two men followed Mordica into the house, and demanded money. Mordica told the men that his wallet was in the bedroom, and in response, the men put the gun to the back of Mordica's head and held onto his pants as they moved Mordica to his bedroom to get the wallet. Once in the bedroom, Mordica took all of the cash from his wallet (approximately \$50.00), and gave it to the men. The men, then, instructed Mordica to sit on the bed. The shorter of the two men held the gun on Mordica, while the taller of the two men proceeded to tear cords from the electrical equipment. Next, the men escorted Mordica at gunpoint into the kitchen area of the residence, with the taller man holding the gun. After reaching the kitchen, the men took Mordica's car keys. The taller man, again gave the gun to the shorter man, and attempted to tie Mordica to a kitchen chair. Mordica, however, fought and was able to overcome the shorter man, who held the gun, and took the weapon from him. During the struggle, the taller man jumped on Mordica's back, but Mordica was able to push him off. One round was discharged from the gun during the scuffle, but did not hit anyone.

The two men were able to extricate themselves from the fray and fled the residence. Thereafter, Mordica called the Jacksonville Police Department and reported the incident. When the police arrived, Mordica gave the officers a description of the robbers. They both had worn black jackets and bandanas. The taller of the two men wore a yellow bandanna, while the shorter man wore a blue bandana over his face. The taller man had a light complexion and a scraggly beard. Mordica subsequently remembered that the shorter man had come to his home, on a previous occasion, with a mutual friend. Mordica remembered that this person had been introduced to him as Devon Jones.

Reginald Waters testified that about one or two weeks before 20 January 1996, his 9 millimeter handgun had been stolen from his Jacksonville residence. He identified the gun which Mordica had taken from his assailants as the gun stolen from his home.

Devon Jones testified that he was one of the assailants who entered Mordica's home on 20 January 1996. Jones further testified that he and defendant decided to rob someone after deciding to go to

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a party, but discovering that neither of them had any money. The two ultimately decided to go to Mordica's house and rob him. Jones had seen the gun used to rob Mordica in the glove compartment of defendant's car, and later made a statement to the police that defendant had told him that the gun was stolen from the Laurindale area of Jacksonville.

The jury found defendant guilty of robbery with a dangerous weapon, first degree kidnapping, felonious possession of stolen goods, and possession of a firearm by a felon. As a result, Judge Ragan sentenced defendant to a minimum of 77 months and a maximum of 102 months imprisonment for robbery with a dangerous weapon, a minimum of 100 months and a maximum of 129 months imprisonment for first degree kidnapping, a minimum of 8 months and a maximum of 12 months imprisonment for possession of a stolen firearm and a minimum of 15 months and a maximum of 23 months imprisonment for the offense of possession of a firearm by a felon. Defendant appeals.

Defendant presents four arguments on appeal, challenging the trial court's submission of and the instruction on the charge of kidnapping, the submission of the charge of felonious possession of stolen property, and the admission of certain State's evidence and exclusion of his proffered evidence. For the reasons discussed herein, we hold that defendant received a fair trial, free from prejudicial error.

[1] Defendant first argues that the trial court committed plain error in instructing the jury on a theory of kidnapping not alleged in the bill of indictment. We cannot agree.

If at trial, a defendant fails to object to a jury instruction, that instruction is reviewable on a plain error standard on appeal. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). The plain error standard requires a defendant to make a showing that absent the erroneous instruction, a jury would not have found him guilty of the offense charged. *Id.*

In the instant case, defendant was indicted for the charge of first degree kidnapping in case number 96CRS3600. This indictment alleged that defendant "unlawfully, willfully and feloniously did kidnap Frank Mordica, Jr., . . . by unlawfully restraining him without his consent and for the purpose of facilitating the commission of a felony: robbery with a dangerous weapon." However, the trial court instructed the jury as follows:

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Now, I charge that for you to find the defendant guilty of first degree kidnapping, the state must prove five things beyond a reasonable doubt: First, that the defendant unlawfully restrained a person, that is, restricted his freedom of movement, or removed a person from one place to another; second, that the person did not consent to this restraint or removal; third, that the defendant restrained or removed that person for the purpose of facilitating his commission of robbery with a firearm; fourth, that this restraint or removal was a separate, complete act, independent of and apart from the robbery with a dangerous weapon; and fifth, that the person was not released by the defendant in a safe place.

Defendant contends that this instruction was plain error in that it allowed the jury to convict him on a theory not stated in the indictment. In support this argument, defendant cites *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986).

In *Tucker*, the North Carolina Supreme Court held that the trial court erred in instructing the jury on a theory of kidnapping not charged in the indictment. The indictment in *Tucker* alleged that the defendant “unlawfully, willfully, and feloniously did kidnap [the victim], . . . by unlawfully removing her from one place to another, without her consent, and for the purpose of facilitating the commission of the felonies of First Degree Rape and First Degree Sexual Offense.” *Id.* at 537, 346 S.E.2d at 420. The trial court instructed the jury that they could find the defendant guilty of first degree kidnapping if they found, in pertinent part, “that the defendant unlawfully restrained [the victim], that is, restricted [her] freedom of movement by force and threat of force.” *Id.* (alterations in original). As the indictment in *Tucker* only allowed for a conviction on the theory of kidnapping by removing the victim from one place to another, while the charge to the jury permitted conviction on an entirely different theory not mentioned in the indictment—restraint, our Supreme Court found that the trial court had committed plain error. Such is not the case in the instant action.

In the case *sub judice*, defendant’s indictment alleged a theory of kidnapping based upon restraint of the victim. The jury instructions given by the trial court permitted conviction on the theory of kidnapping by restraint or removal. *Tucker* is, therefore, not controlling in the present case.

Our Supreme Court has established that a disjunctive instruction which allows the jury to find a defendant guilty if he commits either

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of two underlying acts, either of which is in itself a separate offense, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense. *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986). If, alternatively, the trial court instructs the jury disjunctively as to various alternative acts which will establish an element of the offense, the requirement of unanimity is satisfied. *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990); *State v. Johnston*, 123 N.C. App. 292, 473 S.E.2d 25 (1996), *disc. review denied*, 344 N.C. 737, 478 S.E.2d 10 (1996). In *State v. Fulcher*, our Supreme Court stated, “unlawful removal from one place to another must involve unlawful restraint, [hence,] in any kidnapping case the State may confine the charge against the defendant to kidnapping by unlawful restraint.” *State v. Fulcher*, 34 N.C. App. 233, 242, 237 S.E.2d 909, 915 (1977), *aff’d*, 294 N.C. 503, 243 S.E.2d 338 (1978).

In this case, the facts tend to show that defendant and another forcibly entered the residence of Frank Mordica, Jr., shouting and pointing a gun at him, while demanding his money. The two men, then, while holding onto Mordica’s pants and holding a gun to the back of his head, forced Mordica to a bedroom in the rear of the house where his wallet was located. Upon reaching the bedroom, defendant and his accomplice took all of Mordica’s money. Thereafter, the two perpetrators instructed Mordica to sit on the bed, while defendant tore cords from electrical equipment and his accomplice held a gun on Mordica. The two then directed Mordica, at gun point, into the kitchen where they took Mordica’s car keys. At this point, defendant attempted to tie Mordica to a kitchen chair with electrical cords. Mordica, however, fought and was able to overcome defendant’s accomplice and took the gun from him. The two perpetrators then fled Mordica’s home. We hold that there was no error in the trial court’s instruction that defendant could be found guilty of first degree kidnapping based upon “restraint or removal,” as the evidence at trial supports conviction under both the removal and restraint theories of kidnapping.

[2] Defendant next contends that the trial court erred in submitting the charge of kidnapping to the jury, and in failing to submit the charge of attempted kidnapping. First, defendant argues that there was not sufficient evidence of the element of restraint to submit the charge of kidnapping. Instead, he contends that the evidence showed only an unsuccessful attempt to restrain the victim, so as to support an instruction on attempted kidnapping. Again, we cannot agree.

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Our Supreme Court has noted that restraint or removal is inherently an element of some felonies, such as armed robbery and rape, and therefore, the restraint, confinement or removal required of the crime of kidnapping, has to be something more than that restraint inherently necessary for the commission of these other felonies. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981); *Fulcher*, 294 N.C. 503, 243 S.E.2d 338. Restraint may be accomplished by restricting one's freedom of movement by confinement, or by restricting by force, threat, fraud, without confinement. *State v. Moore*, 77 N.C. App. 553, 335 S.E.2d 535 (1985), *aff'd*, 317 N.C. 144, 343 S.E.2d 430 (1986) (per curiam). Again, this Court noted in *Fulcher*, "unlawful removal from one place to another must involve unlawful restraint." *Fulcher*, 34 N.C. App. at 242, 237 S.E.2d at 915.

The facts in this case are to be distinguished from those of *Irwin*, wherein the Supreme Court found that the victim's removal to the back of a drug store to obtain drugs was an inherent and integral part of the attempted armed robbery. See *Irwin*, 304 N.C. 93, 282 S.E.2d 439. Accordingly, under the principals of *Fulcher*, the Court found that the defendant's removal of his victim was "a mere technical asportation and insufficient to support conviction for a separate kidnapping offense." *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446.

Herein, the evidence tends to show that more than a "mere technical asportation" occurred (1) when defendant and his accomplice restrained and moved Mordica from the front door of his residence to a back bedroom, so that they could take the money contained in Mordica's wallet; and (2) when they then restrained and moved Mordica to the kitchen, where the two took Mordica's keys and attempted to tie up their victim. As concluded in our analysis of defendant's previous argument, there is plenary evidence that tends to show that defendant restrained his victim for the purpose of committing armed robbery. Moreover, the facts in the instant case tend to show that the restraint utilized herein was more than that inherently necessary for the commission of armed robbery.

[3] Defendant further contends that there is no evidence that Mordica was not released in a safe place, so as to raise the charge to first degree kidnapping. See N.C. Gen. Stat. § 14-39 (1993) (providing, *inter alia*, that second degree kidnapping is elevated to first degree kidnapping if the person kidnapped was not released by the defendant in a safe place). This provision of section 14-39 implies some willful action on the part of the defendant to ensure that his victim is

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released in a safe place. *State v. Jerrett*, 309 N.C. 239, 262, 307 S.E.2d 339, 351 (1983).

In the case presently before us, defendant and his accomplice were overpowered by Mordica when they attempted to tie him up with electrical cords. After Mordica wrestled the gun from defendant's accomplice, the two perpetrators fled Mordica's residence. On these facts, there is no evidence of any willful action on defendant's part to release Mordica, much less ensure that Mordica was released in a place of safety.

As there was sufficient evidence to show that defendant restrained his victim for the purpose of committing armed robbery and failed to release him in a safe place, an instruction for first degree kidnapping was supported by the evidence, while an instruction for attempted kidnapping was not. Hence, this argument fails.

[4] Defendant next argues that the trial court erred in submitting the charge of felonious possession of stolen property to the jury. Defendant contends that there was no evidence that he knew or had reasonable grounds to believe the gun in his possession was stolen. We do not agree.

In order for a defendant to be convicted of the crime of possession of stolen property, the State must prove the following:

- (1) possession of personal property
- (2) valued at more than \$400.00 (now \$1,000.00)
- (3) which has been stolen
- (4) [with] the possessor knowing or having reasonable grounds to believe the property to have been stolen, and
- (5) the possessor acting with a dishonest purpose.

State v. Davis, 302 N.C. 370, 373, 275 S.E.2d 491, 493 (1981). If the stolen property is a firearm, then the value of the property is irrelevant. *State v. Taylor*, 311 N.C. 380, 317 S.E.2d 369 (1984). While defendant contends otherwise, there is sufficient evidence to show that he knew or had reasonable grounds to believe that the gun in his possession was stolen, so as to support an instruction on the charge of felonious possession of stolen property.

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In this case, defendant's co-conspirator, Devon Jones, testified at trial that he was with defendant at the time of the 20 January 1996 robbery; that he had previously seen the stolen gun, used in the commission of the robbery, in the glove compartment of defendant's vehicle; and that defendant had told him that the gun was stolen from the Laurindale area of Jacksonville. Moreover, the owner of the gun, Reginald Waters, testified that he lived on the Shamrock side of Laurindale; that the gun had been stolen from him sometime during the second week of January 1996; and that he had identified the gun, taken from the robber by Mordica, as being his. In light of these facts, we conclude that the trial court did not err in submitting the charge of felonious possession of stolen property to the jury.

Finally, defendant contends that the trial court's errors in admitting inadmissible evidence and excluding his proffered evidence on cross-examination resulted in cumulative prejudice to defendant and created a hostile trial environment, thereby resulting in impermissible prejudice to defendant and rendering his trial unfair. A thorough review of the record discloses no such errors, and accordingly, this argument is summarily overruled.

In light of all of the foregoing, we hold that defendant enjoyed a fair trial, free from prejudicial error.

No error.

Judges LEWIS and WALKER concur.

TRAFalgar House Construction, Inc., Plaintiff Appellant v. MSL Enterprises, Inc., d/b/a MSL Enterprises, Defendant Appellee

No. COA97-115

(Filed 6 January 1998)

1. Arbitration and Award § 42 (NCI4th)—construction arbitration—seven disputed contracts—one award—no explanation requested prior to appointment—motion to modify denied

The trial court did not err by denying plaintiff's motion to modify an arbitration award arising from a dispute involving seven contracts between a contractor and a masonry subcontractor where the arbitrators entered a single award, defendant

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moved to confirm the award, and plaintiff moved to vacate or modify the award to show seven separate awards. Neither party requested an explanation of the award prior to the appointment of the arbitrators, as required by CIAR Rule 42, and plaintiff did not allege in its motion that modification was necessary to correct clerical, typographical, technical or computational errors under CIAR Rule 44. Construction Industry Arbitration Rules procedures are consistent with North Carolina law governing the enforcement of arbitration agreements.

2. Arbitration and Award § 42 (NCI4th)—construction arbitration—motion to set aside—allegations of fraud—no nexus with award

The trial court did not err in a dispute between a contractor and a masonry subcontractor by not vacating or setting aside an arbitration award for defendant subcontractor based on allegations that it was procured by fraud and misconduct. The trial court found that plaintiff's evidence did not support plaintiff's allegations of fraud; even if the allegations were true, they were not materially related to an issue in the arbitration proceeding and no nexus was established between the fraud and the award. It is appropriate to interpret N.C.G.S. § 1-567.13 as requiring such a nexus.

Appeal by plaintiff from orders entered 26 July 1996 and 3 December 1996 by Judge F. Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 18 September 1997.

Moore & Van Allen, PLLC, by Christopher J. Blake, for plaintiff appellant.

Brown & Bunch, by John C. Schaefer, for defendant appellee.

MCGEE, Judge.

This dispute arises from the alleged breach of seven contracts entered into by plaintiff, a general contractor, and defendant, a masonry subcontractor, which were submitted to arbitration pursuant to an agreement between the parties. Plaintiff appeals the trial court's 26 July 1996 order to confirm the arbitration award (award) and the 3 December 1996 order denying plaintiff's motion to vacate the award. Plaintiff argues the trial court erred: (1) by confirming a single arbitration award, which was imperfect as a matter of law, because it failed to set out seven separate awards related to each of

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the contractual disputes submitted to arbitration; and (2) by denying a motion to set aside the judgment and vacate the award when the judgment and award were obtained by fraud, corruption and other undue means. The parties entered into seven contracts for separate projects in which defendant agreed to "furnish[] and install[] precast concrete erection, masonry and drywall." To allow defendant to expand its operations to perform these contracts, plaintiff advanced defendant money on a weekly basis for the purchase of insurance and machinery and to meet other expenses.

Defendant performed work pursuant to these seven contracts until 30 August 1995 when defendant informed plaintiff by letter that plaintiff's actions, including "late and nonpayment of invoices, [have] forced [the defendant] to no longer be able to continue on [the plaintiff's] projects." Defendant further informed the plaintiff that if plaintiff could "see fit to uphold its end by paying all past due and outstanding invoices [and] completely fund[ing] all outstanding payroll and all outstanding insurance invoices as per [their] agreement, [defendant would] be happy to return to the projects." In response plaintiff, by letter dated 31 August 1995, informed defendant that "[b]y virtue of that letter and [defendant's] failure to continue the North Carolina projects pursuant to its subcontracts with [plaintiff], [plaintiff] exercises its right under Article XII of the subcontracts and terminates the employment of [defendant]."

On 1 September 1995 plaintiff filed a complaint alleging breach of contract, fraud, and unfair and deceptive trade practices. In response, defendant filed a demand for arbitration with the American Arbitration Association [AAA] and moved to compel arbitration. The trial court entered a consent order on 23 October 1995 staying the litigation and referring all claims to arbitration, except those for claim and delivery.

After extensive discovery and an evidentiary hearing, the arbitration panel entered its award on 13 June 1996 in favor of defendant in the amount of \$590,736.00 plus costs and further determined that "any projects related to this arbitration with still unpaid invoices as of June 3, 1996 are the responsibility of [plaintiff]." Neither party requested a breakdown of the award with respect to the seven contracts prior to the rendering of the award, and the arbitrators made none. However, on 18 June 1996 after the award was entered, plaintiff requested a "breakdown of the Award between the seven separate subcontracts" in a letter to the AAA. Plaintiff stated that one reason

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for the request was that plaintiff "may be entitled to recover all, or some portion of, the Award from one of the owners of the projects or one of the other prime contractors" of the other projects and the form of the existing award "provides no basis for [plaintiff] to make these claims." This request for "modification or explanation" of the Award was denied by the AAA.

After the award was rendered by the arbitrators, defendant filed a motion to confirm the award pursuant to N.C. Gen. Stat. § 1-567.12. Plaintiff filed a responsive motion on 3 July 1996 to vacate the arbitration award on the grounds that the arbitration panel "exceeded its powers" by failing to render separate judgments as to each of the seven contracts. Defendant further moved that "[i]n the alternative, this Court should either modify or correct the award pursuant to N.C. Gen. Stat. § 1-567.14(a)(3) or submit the award to the arbitration panel to correct or modify the award pursuant to [N.C. Gen. Stat. § 1-567.10]." On 26 July 1996 the trial court denied plaintiff's motion and entered an order confirming the award, which plaintiff timely appeals.

Plaintiff filed another motion on 12 September 1996 to set aside the judgment and the order confirming the award and to vacate the award on the grounds of fraud. After conducting an evidentiary hearing the trial court found that plaintiff:

- (1) has failed to establish that the award and judgment in this case were procured by corruption, fraud or other undue means.
- (2) [t]he alleged fraud and wrongful conduct was discoverable upon the exercise of due diligence prior to or during the arbitration hearing.
- (3) [t]he alleged fraud and wrongful conduct have not been established by clear and convincing evidence.
- (4) [t]he alleged fraud is not materially related to an issue in the arbitration hearing.

Specifically the trial court found that the allegations of fraud were supported primarily by the testimony of Susan Milcarek, an employee of defendant who was fired. Milcarek testified that defendant had fraudulently billed plaintiff for insurance premiums and construction costs, including renovations to the personal residence of the owner of the defendant corporation. The trial court found that Milcarek was not a credible witness and that plaintiff had failed to

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establish by “clear and convincing evidence” its other allegations of fraud. The trial court then entered an order on 3 December 1996 denying plaintiff’s motion to set aside the judgment and vacate the award. Plaintiff also appeals this order.

I. Motion to Modify Award

[1] The plaintiff first argues that the trial court erred in denying its motion to modify the arbitration award. We disagree. The interpretation of the terms of an arbitration agreement are governed by contract principles and parties may specify by contract the rules under which arbitration will be conducted. *Futrelle v. Duke University*, 127 N.C. App. 244, 247-48, 488 S.E.2d 635, 638, *disc. review denied*, 347 N.C. 398, 494 S.E.2d 412 (1997); *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479, 103 L. Ed. 2d 488, 500 (1989). In this case, both parties entered into seven subcontracts, each containing a provision in which they agreed to submit “[a]ll claims, disputes and other matters in question arising out of, or relating to, this Subcontract . . . in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association” (CIAR). Under CIAR Rule 42, the arbitrators are only required to “provide a concise, written breakdown of the award” when a request for an “explanation of the award” is made by one of the parties prior to the appointment of the arbitrators. CIAR Rule 44 provides for the modification of an award to “correct any clerical, typographical, technical or computational errors in the award.”

We hold that these CIAR procedures are consistent with North Carolina law governing the enforcement of arbitration agreements. See *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 235, 321 S.E.2d 872, 880 (1984) (enforcing Construction Industry Arbitration Rules adopted by parties pursuant to arbitration agreement). The applicable North Carolina statute governing modification of awards is N.C. Gen. Stat. § 1-567.14(a)(3) (1996), which confers upon the trial court the authority to review an arbitration award and “modify or correct” the award if it is “imperfect in a matter of form, not affecting the merits of the controversy.” The trial court should utilize this power only in “special circumstances” as it is a disfavored procedure, not to be used “to reopen . . . the arbitration . . . with respect to matters which might have been brought forward in the previous proceeding.” See *Futrelle*, 127 N.C. App. at 252, 488 S.E.2d at 641 (quoting *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 23, 331 S.E.2d 726, 730 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986)). Thus, “parties entering

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into arbitration should exercise great care to delineate the precise claims and disputes to be resolved," *Futrelle*, 127 N.C. App. at 252, 488 S.E.2d at 641, including any specific requests that the award conform to a specific form. *See Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 188 (7th Cir. 1985) (remand to arbitration panel for clarification of the award is disfavored procedure), *cert. denied*, 475 U.S. 1010, 89 L. Ed. 2d 300 (1986); *see also Cyclone Roofing Co.*, 312 N.C. at 236, 321 S.E.2d at 880 (trial court did not err by denying motion to modify award on basis of error in manner in which award was calculated pursuant to N.C. G.S. § 1-567.14).

In this case neither party requested an explanation of the award prior to the appointment of the arbitrators and plaintiff did not allege in its motion to modify that modification of the award was necessary to "correct any clerical, typographical, technical or computational errors in the award" under CIAR Rule 44. For these reasons, we hold that the trial court did not abuse its discretion in refusing to modify or clarify the award on these grounds.

II. Motion to Vacate Award

[2] Next plaintiff argues that the trial court should have vacated the arbitration award because it was procured by fraud and misconduct, or in the alternative, the trial judge should have set aside the judgment and confirmation pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(3) (1990) for the same reason. We disagree.

The Federal Arbitration Act (FAA) provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." *Doctor's Assoc. v. Casarotto*, — U.S. —, —, 134 L. Ed. 2d 902, 908 (1996) (quoting 9 U.S.C. § 2 (1947)). The essential thrust of the FAA is to preclude state courts "from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Doctor's Assoc.*, — U.S. at —, 134 L. Ed. 2d at 909 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 41 L. Ed. 2d 270, 276 (1974)). Thus, state courts may not invalidate arbitration agreements on grounds different from those upon which they invalidate contracts. *Doctor's Assoc.*, — U.S. at —, 134 L. Ed. 2d at 909; *Futrelle*, 127 N.C. App. at —, 488 S.E.2d at 638.

To establish grounds for vacating an arbitration award in North Carolina, the moving party must prove not only the existence of

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fraudulent conduct, but also that the “award was *procured* by corruption, fraud or other undue means.” (Emphasis added). N.C. Gen. Stat. § 1-567.13 (1996) (establishing statutory grounds for vacating an award in North Carolina). Federal jurisdictions have interpreted this language, also found in the Federal Arbitration Act, 9 U.S.C. § 10 (Supp. 1997), as requiring a “nexus between the alleged fraud and the basis for the panel’s decision,” *see Forsythe Intern. S.A. v. Gibbs Oil Co. of Texas*, 915 F.2d 1017, 1022 (5th Cir. 1990) (discussing requirements to vacate award on grounds of fraud), and we hold that it is appropriate to interpret N.C. Gen. Stat. § 1-567.13 as also requiring such a nexus. Federal courts have also imposed a similar requirement under Rule 60(b)(3) of the Federal Rules of Civil Procedure by requiring movants to prove that the fraud prevented them from presenting a meritorious defense. *See Green v. Foley*, 856 F.2d 660, 665 (4th Cir. 1989), *cert. denied*, 490 U.S. 1031, 104 L. Ed. 2d 204 (1989).

In this case, the trial court found that the evidence did not support plaintiff’s allegations of fraud. After having the opportunity to observe Milcarek’s testimony, the court found that she was not a credible witness. Moreover, even if the allegations regarding fraud were true, they were not materially related to an issue in the arbitration proceeding and no nexus was established between the fraud and the award because the arbitrators never received Milcarek’s affidavit into evidence. Therefore the trial court’s denials of the motion to vacate and Rule 60(b)(3) motion were proper on these grounds.

The trial court also found that the evidence did not support a conclusion that plaintiff fraudulently overbilled defendant for insurance premiums. The trial court ruled in its 26 July 1996 order that the award did not include “the actual amount of premiums due” because the arbitrators, in the award itself, left this amount “to be determined” at a later time. In its 3 December 1996 order, the trial court found there was “no evidence to support Ms. Milcarek’s allegations that [defendant] ever ‘padded’ its insurance premium billing statement to [plaintiff]. . .” and again referred to its ruling in the 26 July 1996 order that the premiums due are to be determined at a later time. Finally, as to the allegations that plaintiff was fraudulently billed for renovations made to the personal residence of the owner of the defendant corporation, the trial court found in its 3 December 1996 order that these costs were “part of the agreed upon relocation costs” negotiated by the parties. We agree that defendant’s billing of these costs does not constitute evidence of fraud. Accordingly, plaintiff has failed to meet its burden of proving that grounds exist to vacate the confirmation

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award or to reverse the trial court's denial of the Rule 60(b)(3) motion.

We have reviewed the remaining arguments of plaintiff and find them to be without merit.

The trial court's orders are affirmed.

Affirmed.

Judges LEWIS and MARTIN, John C., concur.

THE HOME INDEMNITY COMPANY, THE HOME INSURANCE COMPANY, AND CITY INSURANCE COMPANY, PLAINTIFFS v. HOECHST CELANESE CORPORATION; AETNA CASUALTY & SURETY COMPANY; AIU INSURANCE COMPANY; ALL-STATE INSURANCE COMPANY; AMERICAN CENTENNIAL INSURANCE COMPANY; AMERICAN HOME ASSURANCE COMPANY; AMERICAN MOTORIST INSURANCE COMPANY; AMERICAN PROFESSIONALS INSURANCE COMPANY; AMERICAN RE-INSURANCE COMPANY; ASSOCIATED INTERNATIONAL INSURANCE COMPANY; BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA; CALIFORNIA UNION INSURANCE COMPANY; CENTENNIAL INSURANCE COMPANY; CERTAIN UNDERWRITERS AT LLOYDS LONDON AND CERTAIN LONDON MARKET INSURANCE COMPANIES; CERTAIN UNDERWRITING SYNDICATES OF THE ILLINOIS INSURANCE EXCHANGE; CERTAIN UNDERWRITING SYNDICATES OF THE INSURANCE EXCHANGE OF THE AMERICAS; CIGNA INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; COMMERCIAL UNION INSURANCE COMPANIES; CONTINENTAL CASUALTY COMPANY; CONTINENTAL INSURANCE COMPANY; CRUM & FORSTER INSURANCE COMPANY; EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY; EMPLOYERS MUTUAL CASUALTY COMPANY; ERIC REINSURANCE COMPANY; EXCESS INSURANCE COMPANY, LIMITED; FEDERAL INSURANCE COMPANY; FIREMAN'S FUND INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY; FREMONT INDEMNITY INSURANCE COMPANY; GIBRALTAR CASUALTY COMPANY; GOVERNMENT EMPLOYEES INSURANCE COMPANY (GEICO); HARBOR INSURANCE COMPANY; HARTFORD ACCIDENT AND INDEMNITY COMPANY; HIGHLANDS INSURANCE COMPANY; HUDSON INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; INTERNATIONAL SURPLUS LINES INSURANCE COMPANY; LEXINGTON INSURANCE COMPANY; LONDON GUARANTEE AND ACCIDENT COMPANY OF NEW YORK; LUMBERMEN'S MUTUAL CASUALTY INSURANCE COMPANY; MEADOWS SYNDICATE, INC.; NATIONAL CASUALTY COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, P.A.; NEW ENGLAND INSURANCE COMPANY; NEW ENGLAND REINSURANCE COMPANY; NORTH RIVER INSURANCE COMPANY; NORTH STAR REINSURANCE CORPORATION; NORTHWESTERN NATIONAL CASUALTY COMPANY; NORTHWESTERN NATIONAL INSURANCE COMPANY; PACIFIC INSURANCE COMPANY; PROGRESSIVE AMERICAN INSURANCE COMPANY; PRUDENTIAL REINSURANCE COMPANY; ROYAL INDEMNITY COMPANY; SIGNAL INSUR-

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ANCE COMPANY; ST. PAUL FIRE AND MARINE INSURANCE COMPANY; STONEWALL INSURANCE COMPANY; TORTUGA CASUALTY INSURANCE COMPANY; THE TRAVELERS INDEMNITY COMPANY; TWIN CITY FIRE INSURANCE COMPANY; VIK RE SYNDICATE, INC., UNDERWRITERS REINSURANCE COMPANY; UNITED INSURANCE COMPANIES, INC.; X.L. INSURANCE COMPANY LIMITED; ZURICH INSURANCE COMPANY; DEFENDANTS

No. COA96-1435

(Filed 6 January 1998)

1. Insurance § 895 (NCI4th)— general liability insurance—contamination discovered after termination—no coverage

Under the discovery rule, coverage under general liability policies was not triggered by claims arising from environmental contamination where the leaching of contaminants occurred during the years in which the policies were in effect but the contamination damage was not discovered until after the policies expired.

2. Insurance § 895 (NCI4th)— property damage—discovery rule

The discovery rule mandates that for insurance purposes, property damage occurs when it is manifested or discovered.

Appeal by defendant Hoechst Celanese Corporation from order entered 28 August 1996 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 1996.

This appeal concerns insurance coverage for environmental contamination claims under four general liability policies in effect from 1972-76. The policies here were issued to Hoechst Celanese Corporation ("HCC") by The Home Indemnity Company ("Home"). Because the property in question is located in North Carolina, Home contends that G.S. 58-3-1 causes North Carolina law to apply. For purposes of this appeal, concerning only North Carolina sites, HCC does not contest that North Carolina law applies.

HCC has owned and operated a polyester manufacturing plant in Salisbury, North Carolina, since 1966. Pollutants generated in the normal course of operation have included glycol and Dowtherm. Glycol was disposed of at an on-site treatment plant from 1969 through 1974. HCC has also operated an on-site wastewater treatment plant since 1966. From 1966 through April 1990, the Salisbury plant also disposed

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of its waste at a nearby off-site landfill known as the Needmore Road landfill.

HCC's manufacturing operations at the Salisbury plant and disposal of waste at the Needmore Road landfill caused degradation of soil and groundwater. Glycol and Dowtherm were among the constituent contaminants identified in the groundwater. On 28 April 1988, the State of North Carolina issued two notices of non-compliance to HCC concerning the contamination of groundwater beneath the Salisbury Plant and the Needmore Road landfill. On 6 April 1990, the United States Environmental Protection Agency ("EPA") issued an administrative order directing further cleanup and investigation of the Salisbury Plant site. HCC has also been operating under a state mandate to clean up the contamination at the Needmore Road landfill. HCC seeks to recover the costs of environmental investigation, remediation and cleanup, which aggregate over \$30 million for expenses at the Salisbury Plant and over \$15 million for expenses at the Needmore Road landfill.

HCC filed suit in New Jersey on 14 February 1989 seeking a determination that primary insurance policies issued by Home to HCC cover the claims. On 9 March 1989, Home filed this action in North Carolina seeking declaratory judgment on the same insurance policies and claims. Home named HCC as defendants, as well as all of HCC's primary and excess liability insurance carriers. In August 1989, this case was stayed to allow the New Jersey case to proceed, but the stay was lifted in December 1992.

On 15 March 1996, Home moved for partial summary judgment concerning claims arising from the site in Salisbury, North Carolina, which consists of the HCC plant in Salisbury, as well as the Needmore Road landfill. Following a hearing on 22 and 23 July 1996, partial summary judgment was entered in favor of Home on 28 August 1996. The trial court certified the issues for immediate appeal pursuant to G.S. 1A-1, Rule 54(b). HCC appealed on 20 September 1996. The parties to this appeal agree that the trial court granted summary judgment on the following grounds: (1) policies in effect from 1972 through 1976 are not triggered by claims arising from property damage that occurred during those years, because the contamination was not discovered until after the policies expired; and (2) the insurance policies contain pollution exclusions with exceptions for sudden and accidental releases which bar coverage for claims arising from the Salisbury site.

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Womble Carlyle Sandridge & Rice, P.L.L.C., by Richard T. Rice and Reid C. Adams, Jr., for plaintiff-appellee The Home Indemnity Company.

Lowenstein, Sandler, Kohl, Fisher & Boylan, by Michael Dore and David Field, for defendant-appellant Hoechst Celanese Corporation.

Parker, Poe, Adams & Bernstein, L.L.P., by Irvin W. Hankins, III and Josephine H. Hicks, for defendant-appellant Hoechst Celanese Corporation.

EAGLES, Judge.

[1] We first consider whether the trial court erred in granting partial summary judgment on the grounds that coverage under the policies was not triggered by claims arising from property damage that occurred during the years in which the policies were in effect, because the contamination was not discovered until after the policies expired.

[2] In *West American Ins. Co. v. Tufco Flooring East, Inc.*, 104 N.C. App. 312, 409 S.E.2d 692 (1991), *review allowed*, 330 N.C. 853, 413 S.E.2d 555, *review denied as improvidently granted*, 332 N.C. 479, 420 S.E.2d 826 (1992), this court applied the discovery rule to a property damage case. The discovery rule mandates that “for insurance purposes, property damage ‘occurs’ when it is manifested or discovered.” *Id.* at 317, 409 S.E.2d at 695 (quoting *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1328 (4th Cir. 1986)).

HCC argues that the discovery rule outlined in *Tufco* should not control here. First, HCC argues that this case is distinguishable from *Tufco* because no “trigger of coverage” issue was presented in *Tufco*. HCC contends that the issue in *Tufco* was whether the policy’s pollution exclusion applied, or whether the policy’s completed operations coverage overrode the pollution exclusion. HCC argues that the *Tufco* court had to determine whether the property damage had occurred before the completion of work in order to determine whether the completed operations coverage would have applied. HCC also contends that the *Tufco* court had to resort to an artificial “occurrence” date, the date of discovery, because the actual occurrence date was unknown. In the instant case, HCC maintains that the forecast of evidence establishes that the occurrence at issue took place over a period of time during the coverage period. Second, HCC asserts that

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the *Tufco* decision is based on both distinguishable and outdated authority because the cases which served as a basis for *Tufco* have been rejected. See *Harford County v. Harford Mut. Ins. Co.*, 327 Or. 418, 610 A.2d 286 (Md. 1992). HCC maintains that the current trend among courts is to apply a “contract approach,” relying on traditional rules of contract interpretation. See, e.g., *St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co.*, 324 Or. 184, 923 P.2d 1200 (Or. 1996). Third, HCC argues that because the words “discovery” and “manifestation” are noticeably absent from the policies, that the policies do not condition coverage on the discovery of damage. Fourth, HCC contends that because our Supreme Court has defined the leaching of contaminants as the event that constitutes an occurrence, the time when the leaching took place necessarily establishes when the occurrences took place. See *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374, rehearing denied, 316 N.C. 386, 346 S.E.2d 134 (1986). HCC argues that their forecast of evidence demonstrates that the leaching occurred during the policy years. Accordingly, HCC contends that the Home policies were triggered and summary judgment was inappropriate.

Home argues that the “discovery rule” is clearly the rule in North Carolina. Home argues that because the damage was discovered after the policies expired, there can be no coverage. Home further argues that the occurrence language at issue in *Waste Management* was very different from the definition at issue here, and that the court in *Waste Management* never decided the “trigger of coverage” issue. In *Waste Management*, the policies at issue defined “‘occurrence’ as ‘an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.’” *Id.* at 694, 340 S.E.2d at 379. Home maintains that the policy language at issue here differs materially, defining “occurrence” as “an event, or continuous or repeated exposure to conditions, which unexpectedly causes bodily injury or **property damage during the policy period.**” (Emphasis added). According to Home, “[t]iming of property damage is a crucial element of the ‘occurrence’ definition under the Home policies at issue here. In *Waste Management*, timing was not at issue.” Additionally, Home argues that *Tufco* was decided five years after *Waste Management*, and “clearly stated that this issue had never been ruled on by an appellate court in North Carolina.” Home also maintains that despite HCC’s labeling of HCC’s contentions as a “current trend,” the

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“discovery rule” is not antiquated and continues to be applied. *See CPC Intern., Inc. v. Northbrook Excess & Surplus Ins. Co.*, 668 A.2d 647 (R.I. 1995), *clarification denied*, 673 A.2d 71 (R.I. 1996). Finally, Home maintains that *Mraz*, relied upon by the *Tufco* court in adopting the discovery rule, has not been undermined and has continuing validity.

In *Tufco*, this court announced that “we now expressly adopt the *Mraz* ‘date of discovery’ rationale as the rule in North Carolina, and we hold that **for insurance purposes** property damage ‘occurs’ when it is first manifested or discovered.” *Tufco*, 104 N.C. App. at 318, 409 S.E.2d at 696 (emphasis added). In adopting the discovery rule, the *Tufco* decision did not limit its holding to its facts or otherwise restrict its application to situations in which the occurrence date is unknown. The *Tufco* court determined that the discovery rule applies “for insurance purposes.” *Id.* This Court is bound by *Tufco*. “Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.” *In The Matter Of Appeal From Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

The latest policy at issue here expired on 1 January 1976. By HCC’s own admissions to interrogatories, it is undisputed that the pollution was first discovered in 1980, well after expiration of the last Home policy. Accordingly, based on the *Tufco* rule, it is clear that there can be no coverage for environmental contamination claims under the 1972-76 Home policies. Accordingly, we conclude that summary judgment was properly granted here. Based on our disposition of this issue, we need not reach the remaining issues because they are now moot.

Accordingly, we affirm the trial court’s order granting partial summary judgment for Home.

Affirmed.

Judges WYNN and MARTIN, Mark D., concur.

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STATE OF NORTH CAROLINA v. ALFRED WILLIAM RILEY, JR.

No. COA97-147

(Filed 6 January 1998)

1. Evidence and Witnesses § 945 (NCI4th)— statement by defendant—excited utterance

A murder defendant's statement, made while he was wrestling with the victim after the victim had hit defendant's brother over the head with a chair, that he wasn't going to let the victim go because the victim had a gun, if hearsay, was admissible under the excited utterance exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(2).

2. Evidence and Witnesses § 929 (NCI4th)— excited utterance—testimony by declarant not required

The applicability of the excited utterance exception to the hearsay rule does not depend on the declarant actually testifying in the trial in which the excited utterance is offered.

3. Criminal Law § 433 (NCI4th Rev.)— closing argument—comment on defendant's failure to testify—error not cured

The prosecutor's statement during closing argument in a murder trial that "In order to have self-defense, you got to get on the witness stand and you got to admit that you" constituted an improper comment on defendant's failure to testify. This error was not cured by the trial court's inclusion in the jury charge of an instruction on defendant's right not to testify, and the error was not harmless where the evidence of defendant's guilt was not overwhelming.

Appeal by defendant from judgments dated 23 February 1996 by Judge Robert L. Farmer in Alamance County Superior Court. Heard in the Court of Appeals 27 October 1997.

Attorney General Michael F. Easley, by Special Deputy Attorney General John H. Watters, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Benjamin Sendor, for the defendant appellant.

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GREENE, Judge.

Alfred William Riley, Jr. (Defendant) appeals convictions for first degree murder and assault with a deadly weapon inflicting serious injury.

On 24 November 1994, Defendant and his brother Anthony Lafontant (Lafontant) went to a crowded Burlington bar and dance club known as the Pac-Jam II Club (Club). Michael Angelo Faucette (Faucette) and Varnodia Tinnin (Tinnin) were wounded as a result of gunshots fired in the Club that night. Tinnin subsequently died of the wounds he had received.

Various witnesses testified that, at some point during the evening, Lafontant and Anthony Ray Hurdle (Hurdle) argued. Hurdle's half-brother, Tinnin, ended the argument by hitting Lafontant over the head with a chair. Lafontant fell to the floor, bleeding from a head wound. Gunshots were then heard in the Club. Either before or after the gunshots were heard, the lights in the Club flashed off for a few seconds.

A friend of Tinnin's testified that he saw Defendant firing a gun into the crowd, and that Defendant shot Tinnin as Defendant and Tinnin wrestled. Another friend of Tinnin's testified that after Lafontant fell to the floor, he saw Defendant standing over Tinnin firing gunshots at Tinnin. Hurdle stated that Defendant shot Tinnin after Tinnin hit Lafontant over the head with a chair.

Defendant did not testify. Michael Sharod Evans (Evans), a friend of Defendant, testified for the defense that after Tinnin hit Lafontant over the head with a chair, Defendant and Tinnin began wrestling. Evans testified that as he tried to separate Defendant and Tinnin, Defendant "kept repeating . . . that he wasn't going to let [Tinnin] go because [Tinnin] had that gun." This testimony, elicited on voir dire, was excluded by the trial court over defense counsel's objection that it fell under the "excited utterance" exception to the hearsay rule. Out of the jury's presence, the trial court stated its reasons for exclusion of Evans's testimony as follows:

If you want that evidence, if you want that evidence in, you're going to put the defendant on the stand. That's the only way it's going to get in under the rules. I think you probably know what the rule is. There's no way you can get that evidence in through this witness. You have to let the defendant testify to it; and then

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if you want to put this witness back on to corroborate his testimony, then that's, that's fine.

Other witnesses testified that Tinnin had shown them a gun earlier that night; however, no one else testified that Tinnin had a gun during his struggle with Defendant.

A defense witness testified that he heard gunfire from more than one gun at the time Faucette and Tinnin were shot. Another defense witness testified that she heard several gunshots, some "loud," making a "pow, pow, pow" noise, and others that were "softer," making a "pop, pop, pop" noise.

Tinnin himself was still conscious when he arrived at the hospital. An emergency room nurse testified that she asked Tinnin who had shot him. Tinnin responded "I don't know."

At the close of all the evidence, Defendant requested the trial court to instruct the jury on defense of another. The trial court refused.

During the State's closing argument, the following exchange occurred before the jury:

[Prosecutor:] But they want you to think that there's some kind of self-defense. In order to have self-defense, you got to get on the witness stand and you got to admit that you . . .

[Defense Counsel:] Objection to any further references to self-defense as the Court is not going to charge on it. Also object to this commentary on whether or not the defendant has chosen to testify. That is improper. [The prosecutor] should know that.

COURT: Sustained as to latter part of it. As to self-defense, motion denied. You may continue.

The court made no further curative instruction during the State's closing argument. The trial court did later include, in its jury charge, the following instruction:

Now, during this trial, members of the jury, the defendant, Mr. Riley, has not testified himself. The law of the State of North Carolina gives him this right and privilege. This same law also assures him that his decision not to testify creates no presumption against him. Therefore, his not testifying during this trial is not to influence your decision in any way in this case.

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The jury found Defendant guilty of the first degree murder of Tinnin, and assault with a deadly weapon inflicting serious injury to Faucette. Defendant was sentenced to life imprisonment without parole for the murder of Tinnin, to be followed by a minimum of forty-two months and a maximum of sixty months imprisonment for the assault of Faucette.

The issues are whether: (I) the trial court improperly excluded defense witness testimony; and (II) the State's prosecutor improperly commented on Defendant's decision not to testify.

I

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1991). Hearsay is generally inadmissible at trial. N.C.G.S. § 8C-1, Rule 802. An "excited utterance," which is a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition," however, is not excluded by the hearsay rule. N.C.G.S. § 8C-1, Rule 803(2). For a statement to qualify as an excited utterance, there must be "(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988) (quoting *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985)).

[1] In this case, Evans's proffered testimony, that Defendant "kept repeating . . . that he wasn't going to let [Tinnin] go because [Tinnin] had that gun," was *not* offered to prove "the truth of the matter asserted" (*i.e.*: that Tinnin had a gun while Defendant and Tinnin were wrestling). Instead, defense counsel contended before the trial court that Evans's testimony was offered to show Defendant's "motivation in refusing . . . to let [Tinnin] go" (*i.e.*: that Defendant believed Tinnin had a gun while they were wrestling). As such, Evans's testimony was arguably not excludable as hearsay; however, even considering the statement as hearsay, the circumstances show that it would fall under the excited utterance exception to the rule. The evidence revealed that Defendant had just witnessed his brother fall to the floor bleeding after being hit over the head with a chair by Tinnin. In addition, Defendant was wrestling with Tinnin when the statement to Evans was made. These events were "sufficiently startling" to suspend reflective thought, and Defendant's comments occurred while

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Defendant was under the stress of these events. Defendant's comments were therefore excited utterances within the meaning of Rule 803(2).

[2] During a voir dire discussion after the trial court sustained the State's objection to Evans's testimony, the court stated why it found the Defendant's excited utterance inadmissible.

If you want that evidence, if you want that evidence in, *you're going to put the defendant on the stand*. That's the only way it's going to get in under the rules. I think you probably know what the rule is. There's no way you can get that evidence in through this witness. *You have to let the defendant testify to it*; and then if you want to put this witness back on to corroborate his testimony, then that's, that's fine.

(Emphasis added.) The trial court obviously believed that Defendant would have to take the stand and testify on his own behalf in order to have Evans's testimony as to Defendant's statements admitted into evidence. This was an erroneous belief. The applicability of the excited utterance exception to the hearsay rule does *not* depend on the declarant actually testifying in the trial where the excited utterance is offered. 2 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 216, at 85, n.344 (4th ed. 1993) [hereinafter 2 *Broun on Evidence*]; *see also* N.C.G.S. § 8C-1, Rule 803 (listing exceptions to the hearsay rule, including the excited utterance exception, which do not require declarant unavailability). This is so even if the declarant is the defendant in a criminal trial and exercises his constitutional right not to testify. 2 *Broun on Evidence* § 216, at 85, n.344.

II

[3] “[A] criminal defendant may not be compelled to testify, and . . . ‘any reference by the State regarding his failure to testify is violative of his constitutional right to remain silent.’” *State v. Thompson*, 118 N.C. App. 33, 39, 454 S.E.2d 271, 275, *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995) (quoting *State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994)). Our courts have consistently held that where the State comments on the defendant's failure to testify, “the error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness.” *State v. Reid*, 334 N.C. 551, 556, 434 S.E.2d 193, 197 (1993) (citations omitted). The “subsequent inclusion in the jury charge of

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an instruction on a defendant's right not to testify" does not, by itself, cure such comments. *Baymon*, 336 N.C. at 758, 446 S.E.2d at 6 (prosecutor stated, when discussing the number of times the victim had been sexually assaulted, "[the defendant's] not going to tell you"). If the trial court does not give a curative instruction to the jury immediately following prosecutor comments before the jury concerning the defendant's failure to testify, "the prejudicial effect of such an uncured, improper reference mandates the granting of a new trial," *Reid*, 334 N.C. at 556, 434 S.E.2d at 197, unless the State can show the error was harmless beyond a reasonable doubt, *Baymon*, 336 N.C. at 758, 446 S.E.2d at 6; N.C.G.S. § 15A-1443(b). If the State shows overwhelming evidence of the defendant's guilt, this may render such comments harmless beyond a reasonable doubt. *State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982).

In this case, the prosecuting attorney argued before the jury: "In order to have self-defense, you got to get on the witness stand and you got to admit that you . . ." When defense counsel objected on two grounds to the comments of the prosecutor, the trial court's sole curative instruction was: "Sustained as to latter part of it." The trial court gave no further curative instruction at that time. Although the trial court later (after the closing arguments of counsel) included within the jury charge that the defendant had a right not to testify and that his failure to testify should not influence them, this instruction does not cure the error committed earlier (during the State's closing argument).

The State has not shown that this error was harmless beyond a reasonable doubt. Although there is testimony from several witnesses that Defendant fired the shots that injured Faucette and killed Tinnin, the Defendant's witnesses presented evidence tending to show that someone other than Defendant also fired shots during the struggle. In addition, Tinnin himself did not know who shot him. This evidence does not overwhelmingly show that Defendant is guilty of first degree murder. The prosecutor's comments concerning Defendant's failure to testify, not timely corrected by the trial court, therefore require a new trial.

Defendant has raised other arguments on appeal that are mooted by our grant of a new trial and we therefore do not address them. *See State v. Fearing*, 304 N.C. 499, 504-05, n.2, 284 S.E.2d 479, 483, n.2 (1981). Cf. *State v. Collins*, 334 N.C. 54, 63, 431 S.E.2d 188, 194 (1993)

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(declining to address errors which are “unlikely” to arise again at the defendant’s new trial).

New trial.

Chief Judge ARNOLD and Judge McGEE concur.

DOUGLAS R. JONES, PLAINTIFF v. CAPITOL BROADCASTING COMPANY, INC., AND CAROLINA FORD DEALERS ADVERTISING ASSOCIATION, INC., DEFENDANTS

No. COA97-94

(Filed 6 January 1998)

1. Consumer and Borrower Protection § 53 (NCI4th)— promotional contest—announcement of winner—prize not delivered—contract claim—allegations sufficient

Plaintiff’s allegations were sufficient to state a claim for breach of contract arising from a promotional campaign with a Ford pick-up truck as the contest grand prize where plaintiff alleged that he had entered the contest by submitting an entry form in exchange for an opportunity to have it drawn as the winning ticket, his name was drawn and he was notified that he had won the prize, and he never received the truck nor anything else. Advertising a promotional contest to the public is in the nature of an offer, an enforceable contract is formed when a party accepts that offer, and consideration is provided by entering the contest and complying with all of the terms of the offer.

2. Consumer and Borrower Protection § 53 (NCI4th)— promotional contest—prize not delivered—violation of N.C.G.S. § 75-32—allegations sufficient

Plaintiff’s allegations were sufficient to state a claim for violation of N.C.G.S. § 75-32 arising from a promotional campaign involving a Ford pick-up truck as the contest grand prize where defendants were in the business of advertising and selling automobiles; the contest was calculated to promote and encourage additional sales of those automobiles; defendants used language which had a tendency to lead plaintiff to believe that he had won a new truck in its contest; he was told “Congratulations, you have won a new Ford F-150 truck,” thereby triggering the statute; and

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defendants then failed to deliver the truck to plaintiff within ten days of its representation to him that he had won.

**3. Unfair Competition or Trade Practices § 30 (NCI4th)—
promotional contest—prize not delivered—N.C.G.S.
§ 75-1.1—no aggravating circumstances—allegations—not
sufficient**

Plaintiff did not state a claim for violation of the unfair and deceptive trade practices act under N.C.G.S. § 75-1.1 arising from a promotional campaign with a Ford pick-up truck as the contest grand prize where plaintiff merely contended that defendants breached a contract by failing to award him the truck and did not allege any aggravating circumstances. A mere breach of contract, even if intentional, is not an unfair or deceptive act.

Appeal by plaintiff from order entered 25 November 1996 by Judge Melzer A. Morgan in Guilford County Superior Court. Heard in the Court of Appeals 18 September 1997.

Clark Wharton & Berry, by Frederick L. Berry, for plaintiff-appellant.

Adams, Kleemeier, Hagan, Hannah & Fouts, by W. Winburne King, III, and Benjamin A. Kahn, for defendants-appellees.

LEWIS, Judge.

Plaintiff appeals from an order granting defendants' motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

According to the allegations of the complaint, during the 1995-1996 football season, defendants conducted a promotional campaign to promote the Carolina Panthers football team and the Ford Dealers of North Carolina, the "One Half Ton of Fun" Contest ("Contest"). Defendants advertised to the general public a contest for which the grand prize was a new Ford F-150 pickup truck. Plaintiff filled out an entry form and entered the Contest. On 16 January 1996, defendants' agent, Brittany Foster, notified plaintiff that he had been selected as the winner. Plaintiff alleged that Ms. Foster stated: "Congratulations, you have won a F-150 Ford truck." At first plaintiff did not believe that he had won the Contest, but after repeated assurances from Ms. Foster, he was convinced. Later that day, Scott Crites, Manager of the Carolina Panthers Radio Network, called plaintiff and told him that

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he had not won the Contest and that the prize had been given to someone else.

Defendants maintained that plaintiff was not the winner because his name was not the first selected from the drawing. Unable to reach the first person whose name was drawn, defendants selected plaintiff's name during a second drawing. Subsequently, the first winner appeared to claim his prize and defendants awarded him the truck.

Plaintiff initiated this suit alleging breach of contract, violation of N.C. Gen. Stat. § 75-32, "Representation of Winning a Prize," and violation of N.C. Gen. Stat. § 75-1.1 for unfair and deceptive trade practices. Defendants moved to dismiss plaintiff's complaint for failure to state a claim for which relief could be granted. The motion was granted, and plaintiff appeals.

Plaintiff assigns error to the trial court's dismissal of its complaint on the three aforementioned grounds. We find that plaintiff has stated a claim for breach of contract and violation of G.S. § 75-32, but not for unfair and deceptive trade practices.

Our standard of review of a motion to dismiss is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Harris v. NCNB Nat'l Bank of N.C.*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling upon such a motion, the complaint is to be liberally construed, and the trial court should not dismiss the complaint "unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987).

[1] With these principles in mind, we find that plaintiff has stated a claim for breach of contract against defendants. Plaintiff alleges that a contract was formed when he submitted his entry ticket according to contest rules. Defendants respond that no contract exists because the contest was completely voluntary, unconnected to the purchase of an automobile, and placed no obligation on plaintiff. As a result, defendants contend that there is no consideration supporting the purported contract.

Whether the entry of a contest ticket into a raffle or contest gives rise to a binding contract is an issue of first impression for North Carolina courts. We choose to follow the majority of jurisdictions that hold contract law governs the issue. *See Annotation, Private Contest*

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and Lotteries: Entrants' Rights and Remedies, 64 A.L.R.4th 1021, 1045-52 (1988). We adopt the rule that advertising a promotional contest to the public is in the nature of an offer. An enforceable contract is formed when a party accepts that offer and consideration is provided by entering the contest and complying with all of the terms of the offer. See *Walters v. National Beverages, Inc.*, 422 P.2d 524 (Utah 1967) (public promotion program offering automobile as first prize governed by contract law); *Johnson v. BP Oil Company*, 602 So.2d 885 (Ala. 1992) (running a promotional contest is in the nature of offer and enforceable contract is formed when party accepts); *Haynes v. Department of the Lottery*, 630 So.2d 1177 (Fla. 1994) (lottery winner's entitlement to a prize is governed by the principles of contract law), *review denied*, 642 So.2d 746 (1994); *Lucas v. Godfrey, Reader's Digest Association*, 467 N.W.2d, 180 (Wis. 1991) (contract law governs relationship between sponsor and contestant, so that contestant who returns card accepts offer to enter the contest and if number is selected, contestant is entitled to prize).

In this case, plaintiff alleged that he entered the Contest by submitting an entry form in exchange for an opportunity to have it drawn as the winning ticket. Plaintiff's name was drawn and plaintiff was notified by defendant that he had won the prize or its cash equivalent. Plaintiff has never received the truck or anything else. We find these allegations sufficient to state a claim for breach of contract.

[2] Next, we also find that plaintiff has stated a cause of action under G.S. § 75-32. The statute provides:

No person, firm or corporation engaged in commerce shall, in connection with the sale or lease or solicitation for the sale or lease of any goods, property, or service, represent that any other person, firm or corporation has won anything of value or is the winner of any contest, unless all of the following conditions are met:

- (1) The recipient of the prize must have been selected by a method in which no more than ten percent (10%) of the names considered are selected as winners of any prize;
- (2) The recipient of the prize must be given the prize without any obligation; and
- (3) The prize must be delivered to the recipient at no expense to him, within 10 days of the representation.

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The use of any language that has a tendency to lead a reasonable person to believe he has won a contest or anything of value, including but not limited to "congratulations," and "you are entitled to receive," shall be considered a representation of the type governed by this section.

G.S. § 75-32 (1994).

Defendants argue that plaintiff has not stated a claim under the statute because they were not engaged "in commerce . . . in connection with the sale or lease or solicitation for the sale or lease of any goods" while operating the Contest. Plaintiff counters by claiming that while the purchase of a car was not necessary, the clear purpose of the contest was to advertise, generate interest in, and solicit customers for the purchase of Ford automobiles. This purpose qualifies as commerce in "connection with the sale or solicitation of goods."

Defendants admit in their own brief that, "as a promotion, Capitol Broadcasting and Carolina Ford dealers organized a contest to give away a Ford F-150 truck." Advertising and promoting consumer interest in one's products are clearly business activities. Defendants rely on our decision in *Malone v. Topsail Area Jaycees, Inc.*, 113 N.C. App. 498, 439 S.E.2d 192 (1994), in which we found that promotional activity did not amount to "business activities . . . in commerce." However, *Malone* is distinguishable from the facts of this case. In *Malone*, we held that a golfing contest which was sponsored by a non-profit corporation in order to raise money did not, "in the absence of any other evidence or allegations relating to the business activities" of the nonprofit corporation, "affect[] commerce" for purposes of the unfair and deceptive trade practices statute. *Id.* at 502, 439 S.E.2d at 194.

In the instant case, defendants are in the business of advertising and selling automobiles. The Contest was calculated to promote and encourage additional sales of those automobiles. Defendants used language which had a tendency to lead plaintiff to believe that he had won a new truck in its contest; he was told "Congratulations, you have won a F-150 Ford truck," thereby triggering the statute. Defendants then failed to deliver the truck to plaintiff within ten days of its representation to him that he had won. We find these allegations sufficient to state a claim for violation of G.S. § 75-32.

[3] Finally, plaintiff contends that he has also stated a claim for violation of the unfair and deceptive trade practices act under G.S. § 75-1.1. We disagree.

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Under G.S. § 75-1.1, an act or practice is unfair if it "is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). An act or practice is deceptive if it "has the capacity or tendency to deceive." *Id.* at 548, 276 S.E.2d at 403. A mere breach of contract, even if intentional, is not an unfair or deceptive act under G.S. § 75-1.1. *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989); *Mosley & Mosley Builders, Inc. v. Landin Ltd.*, 97 N.C. App. 511, 518, 389 S.E.2d 576, 580, *disc. review denied*, 326 N.C. 801, 393 S.E.2d 898 (1990). "[A] plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act." *Bartolomeo*, 889 F.2d at 535.

A claim is properly dismissed where there is "an absence of facts sufficient to make a good claim." *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 401 S.E.2d 133 (1991). Here, plaintiff's complaint does not allege any aggravating circumstances. Plaintiff merely contends that defendants engaged in unfair and deceptive business practices by breaching its contract in failing to award him a truck. We conclude that these facts do not present aggravating circumstances surrounding defendant's breach of contract and are insufficient to raise a claim of unfair and deceptive practices pursuant to G.S. § 75-1.1.

In conclusion, we find that plaintiff has stated a claim for breach of contract and a claim under G.S. § 75-32, but has not stated a claim of unfair deceptive trade practices under G.S. § 75-1.1. The trial court's order is therefore affirmed in part and reversed in part.

Affirmed in part and reversed in part.

Judges MARTIN, John C. and McGEE concur.

PHIL MOORE AND WIFE, LINDA MOORE, AND W. R. MOORE AND WIFE, ELAINE MOORE, PLAINTIFFS V. HARRY R. LEVERIS AND WIFE, BETTY W. LEVERIS, DEFENDANTS

No. COA97-534

(Filed 6 January 1998)

1. Highways, Streets, and Roads § 15 (NCI4th)— neighborhood public road—no easement for sewer line

Even if a roadway on plaintiffs' land formerly used by the public for ingress and egress constituted a neighborhood public

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road, defendants had no right to place a sewer line serving their residence under this roadway because the scope of the easement vested in defendants by N.C.G.S. § 136-67 is the right of ingress and egress held by the public which formerly used the roadway and does not include the installation of a sewer line.

2. Trespass § 6 (NCI4th)—sewer line—installation on plaintiffs' property—county permit—easement condition not met—no claim of right

A sewer line installed by defendants under a roadway on plaintiffs' land was not installed under a claim of right so as to defeat plaintiffs' action for trespass because a permit for a sewer line had been issued by the county health department where the permit was premised upon the condition that defendants install their sewer line in a "legally recorded easement," and defendants acquired no easement for their sewer line.

Appeal by defendants from order entered 14 February 1997 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 3 December 1997.

Tart, Willis & Fusco, P.A., by O. Henry Willis, Jr., for plaintiffs-appellees.

Law Offices of James M. Johnson, by James M. Johnson, for defendants-appellants.

TIMMONS-GOODSON, Judge.

This action arises out of the alleged trespass of defendants Harry R. Leveris, and wife, Betty W. Leveris, upon the property of plaintiffs Phil Moore, his wife, Linda Moore, W. R. Moore, and his wife, Elaine Moore. Plaintiffs and defendants are adjoining landowners. Plaintiffs enjoy undisputed title to a 17.33 acre tract of land which abuts State Road 1805 (also known as "Weeks Road") in Harnett County, North Carolina. Defendants own a one acre tract of land upon which their home is situated. Defendants' tract of land and home front State Road 1805, and defendants have direct access to this road.

In late 1989, when defendants decided to build a home on their tract, they could not obtain a septic tank permit from the Harnett County Health Department, because the land is not suitable for septic tank use. Defendants' land is located in the country and is, therefore, not served by a county sewer system. Defendants subsequently

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learned of a way by which they could pump their sewage from their land to Gary Webb's adjoining property where it would then perk and thereby meet health department standards.

On 19 January 1990, defendants obtained an easement from Webb, which permitted the installation of a sewer line under Webb's land and maintenance of holding tanks and a sewage absorption field on his land to dispose of defendants' sewage. This easement is recorded in Deed Book 906 at page 894 of the Harnett County Registry. Defendants also dug a trench on plaintiffs' land and placed their sewer line along the path that runs from Weeks Road by defendants' house (a distance of several hundred yards in a westerly direction) back to a tract of land owned by Webb.

Defendants did not obtain a written, recorded easement from plaintiffs to cross their land with defendants' sewer line, but contend that plaintiffs Phil and W. R. Moore's father, Evander Moore, told defendant Betty Leveris (prior to defendants' laying the sewer line on plaintiffs' property) that defendants did not need an easement because the road was "no man's" land. Defendants contend that Evander Moore told Betty Leveris to put the pipe down, and assured her that there would be no trouble. Plaintiffs deny that they ever gave consent for defendants to lay a sewer line on their property. On 27 March 1990, the Harnett County Health Department issued an improvement permit that allowed defendants to install a septic tank and a pumping station on the land to pump defendants' sewage from defendants' land through an underground sewer line located in a legally recorded easement to land that would perk.

Plaintiffs filed this action on 28 October 1994, alleging that defendants were trespassing on plaintiffs' property with a four inch sanitary sewer line laid for the purpose of disposing of raw sewage from defendants' residence onto the property of Gary Webb. Plaintiffs sought an injunction restraining defendants from further trespass on their property, and a mandatory injunction ordering defendants to remove the sewer line from plaintiffs' land. Defendants filed an answer to plaintiffs' complaint, denying that they were trespassing on plaintiffs' property, and alleging as an affirmative defense, that their sewer line was installed on plaintiffs' property under a claim of right.

Thereafter, on 13 January 1997, plaintiffs filed a motion for summary judgment. In support of their motion, plaintiffs offered defendants' depositions, and several affidavits. Defendants filed their response to plaintiffs' motion for summary judgment on 24 January

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1997. This response was supported by the deed of the easement from Gary Webb, and various affidavits. Plaintiffs' motion for summary judgment was heard by Judge Wiley F. Bowen during the 27 January 1997 civil session of Harnett County Superior Court. By order entered 14 February 1997, Judge Bowen granted plaintiffs' motion for summary judgment. Defendants appeal.

Defendants present but one assignment of error on appeal, by which they argue that the trial court erred in granting plaintiffs' motion for summary judgment. For the reasons discussed herein, this assignment of error fails, and accordingly, we affirm the trial court's entry of summary judgment for plaintiffs.

[1] First, defendants contend that summary judgment was improper because there was a genuine issue of material fact as to whether the roadway, under which defendants placed their sewer line, was a neighborhood public road, under which defendants had a right to install the sewer line. Summary judgment is a device by which the necessity of a formal trial may be eliminated, where only questions of law are involved and a fatal weakness in the claim or defense of a party is exposed. *Robertson v. Hartman*, 90 N.C. App. 250, 368 S.E.2d 199 (1988). At trial, the moving party bears the burden to establish the lack of triable issue of material fact. *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 449 S.E.2d 240 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). If the moving party carries this burden, the burden then shifts to the nonmoving party to present a forecast of the evidence which will be available for presentation at trial and which will tend to show that genuine issues of fact remain for trial. *Southeastern Asphalt v. American Defender Life*, 69 N.C. App. 185, 316 S.E.2d 311 (1984). On appeal, the trial court's entry of summary judgment for a particular party will be affirmed if viewing the evidence in the light most favorable to the nonmoving party, (1) there is no genuine issue of material fact, and (2) the moving party is entitled to judgment as a matter of law. *Vassey v. Burch*, 301 N.C. 68, 269 S.E.2d 137 (1980).

In the case *sub judice*, plaintiffs brought this trespass action against defendants, alleging that defendants had, without permission, placed a sewer disposal line across plaintiffs' property for the purpose of disposing of raw sewage. Defendants, in their answer, claimed that said sewer disposal line had been installed on a public easement (a neighborhood public road), and set forth as an affirmative defense, that the sewer line was installed under claim of right.

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In support of their motion for summary judgment, plaintiffs produced evidence that tended to show that they were the record owners of a 17.33 acre tract of land; that plaintiffs' tract is adjacent to defendants' property; that plaintiffs have never granted an easement over the subject property; and that "a [four] inch sanitary sewer force main [is] located on the property of . . . plaintiffs, running for a distance of not less than [one thousand] feet along the northernmost boundary of plaintiffs' [property]." Plaintiffs, then, made a *prima facie* showing of defendants' trespass on plaintiffs' property.

In rebuttal, defendants presented evidence that tended to show that the area under which their sewer line was installed on plaintiffs' property had been the main road leading from Dunn, North Carolina to Benson, North Carolina. Further, defendants showed that various members of the public have used the road for ingress and egress—by foot, horse and wagon, and vehicle. Defendants maintain that this evidence rebuts plaintiffs' evidence of trespass. Specifically, defendants claim that their evidence tends to show that they had the right to install the sewer line on plaintiffs' property because that property was a neighborhood road. We cannot agree.

Section 136-67 of the North Carolina General Statutes declares three distinct types of roads to be neighborhood public roads: (1) those roads which were once a part of the "public road system"; (2) those roads that had been "laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Human Resources"; and (3) "[t]hose roads outside of the boundaries of municipal corporations which serve public use and as a means of ingress and egress for one or more families." *Watkins v. Smith*, 40 N.C. App. 506, 511, 253 S.E.2d 354, 357 (1979); *see* N.C. Gen. Stat. § 136-67 (1993). Defendants argue and aver that their evidence tends to show that the roadway in question is a neighborhood public road within the meaning of the first provision of section 136-67, which provides pertinently:

All those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the Department of Transportation, but which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families, . . . are hereby declared to be neighborhood public roads

N.C.G.S. § 136-67. However, under section 136-67, no street, road or driveway that serves an essentially private use may be defined to be a neighborhood public road. *Id.*

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Assuming *arguendo* that defendants' evidence creates a triable issue of fact as to whether the property upon which their sewage line rests is a neighborhood public road, we inevitably conclude that defendants cannot show that this alone entitles them to install a sewer line under a property that statutorily permits an easement for ingress and egress. Article 4, Chapter 136 of the General Statutes is entitled "Neighborhood Roads, Cartways, Church Roads, etc." and governs the establishment, alteration or discontinuance of neighborhood roads, cartways, church roads, mill roads, or like easements. Therein, the only section that addresses easements and/or right-of-ways for sewer lines is section 136-71, which provides that a church or other place of public worship may acquire such an easement or right-of-way upon petition to the clerk of superior court. N.C. Gen. Stat. § 136-71 (1993). As defendants' sewer line services only their residence, the provisions of section 136-71 are not applicable to this case.

Section 136-67 retained and reserved the easements previously owned by the State in and to segments of abandoned roadways, as neighborhood public roads, *Woody v. Barnett*, 235 N.C. 73, 68 S.E.2d 810 (1952), and does not invest any private easement in owners of property abutting the abandoned road, *Mosteller v. R.R.*, 220 N.C. 275, 17 S.E.2d 133 (1941). These property owners' right to the continued use of such a road is usually the same as that of the public. *Id.* "Generally, 'once an easement has been established, the easement holder must not change the use for which the easement was created so as to increase the burden of the servient tract.'" *Swaim v. Simpson*, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786 (1995) (citing I. Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 15-21 (4th ed. 1994) (alteration in original)), *aff'd*, 343 N.C. 298, 469 S.E.2d 553 (1996).

The scope of the easement vested in defendants by section 136-67 is that right of ingress and egress held by the public which formerly used the roadway. Defendants cannot be allowed to enlarge the use of the easement, absent some legal right to do so. Mere grant of the right of ingress and egress does not allow defendants to install a sewer line on that property. *See id.* (holding that the plaintiff's express easement of right-of-way for ingress and egress over the defendants' property would not be enlarged to allow the installation of an underground utility and telephone lines on the defendants' property, absent express provision for such, although the plaintiff's deed restricted his lot to residential use).

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[2] Defendants also contend that summary judgment was improper because there was a genuine issue of material fact as to whether defendants installed their sewer line under a claim of right pursuant to a permit issued by the Harnett County Health Department. This argument is unsupported by any citation to authority, and is, therefore, deemed abandoned. N.C.R. App. P. 28(b)(5). Moreover, the argument is specious. Clearly, the permit issued by the Health Department was premised upon the condition that defendants install their sewer line in a "legally recorded easement." As this condition was not met, defendants cannot now successfully maintain that the sewer line installed on plaintiffs' property was installed under any claim of right.

Because defendants cannot show that there is, indeed, any genuine issue remaining for trial as to whether they were legally entitled to lay their sewer line under plaintiffs' property, plaintiffs' motion for summary judgment was properly granted. Accordingly, the order of the trial court is affirmed.

Affirmed.

Judges LEWIS and WALKER concur.

WALLACE L. SMITH, PLAINTIFF v. WAL-MART STORES, INC. DEFENDANT

No. COA97-524

(Filed 6 January 1998)

1. Negligence § 152 (NCI4th)— slip and fall—store entrance on rainy day—negligence and contributory negligence—summary judgment denied

The trial court did not err by denying summary judgment for defendant on its own negligence or on plaintiff's contributory negligence in a slip and fall in a store on a rainy day.

2. Negligence § 152 (NCI4th)— slip and fall—store entrance on rainy day—store's negligence—judgment notwithstanding the verdict denied

The trial court did not err by denying defendant's motion for a directed verdict or judgment notwithstanding the verdict on its negligence in a slip and fall case where the evidence showed that it was raining on the date in question; the floor at the entrance of

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the store was wet and had been for at least an hour; no warning signs were present; plaintiff slipped and fell after walking over a short mat; plaintiff noticed while on the ground that his sweatshirt was wet, as was the floor around him; defendant's employees began bringing mops and warning signs to the area of the store where he had fallen while plaintiff was sitting on the floor; and an assistant manager testified that it was normal practice to mop the floor on a regular basis, especially on rainy days, but could not recall the last time the floor where plaintiff fell had been mopped on that date.

3. Negligence § 152 (NCI4th)— slip and fall—store entrance on rainy day—contributory negligence—judgment notwithstanding the verdict denied

The trial court did not err by denying defendant's motion for a directed verdict or judgment notwithstanding the verdict on plaintiff's contributory negligence in a slip and fall on a rainy day in a store where there was an issue for the jury as to whether a reasonably prudent person exercising ordinary care would have seen the water on the floor.

Appeal by defendant from judgment entered 9 December 1996 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 3 December 1997.

Dunn, Dunn, Stoller & Pittman, L.L.P., by Andrew D. Jones, for defendant-appellant.

Jackson, Rivenbark & Slaughter, by Bruce H. Jackson, Jr. and M. Troy Slaughter, for plaintiff-appellee.

WALKER, Judge.

Plaintiff filed this action on 5 April 1995 seeking damages for injuries sustained as a result of his fall in defendant's store in Wilmington, North Carolina. Defendant moved for summary judgment which was denied by the trial court.

At trial, the evidence tended to show that on the morning of 5 November 1993, plaintiff and his wife arrived at defendant's store around 11:00 a.m. Since it was raining, plaintiff dropped his wife off at the front of the store and proceeded to park the car. Plaintiff then walked across the parking lot and entered the store where he met his wife. After walking across a small mat, plaintiff took a few more steps

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before he slipped and fell, landing with the weight of his body on his right shoulder. While on the floor and awaiting medical attention, plaintiff felt the right side of his body and noticed that his sweatshirt was soaked with water. He then glanced at the floor around him and noticed that it was wet as well.

Plaintiff testified on his own behalf and then called as a witness Betsy Adams (Adams), who had been in the store approximately one hour prior to plaintiff. Adams stated that when she entered the store around 10:00 or 10:15 a.m. on the morning of 5 November 1993, the floor at the entrance of the store was "wet, slightly muddy, [and] kind of slippery." She further testified that she did not see any warning signs at the entrance of the store advising customers of the wet condition of the floor nor did she observe any mops or buckets at the entrance of the store.

Following Adams' testimony, plaintiff offered the videotaped deposition testimony of the physician that treated his injuries. Plaintiff then rested and defendant moved for a directed verdict, which the trial court reserved ruling upon.

Defendant offered evidence from Barbara Davis (Davis), who was an assistant manager at the store on 5 November 1993. She testified that she was at the snack bar, which is just to the right of the entrance, when she heard plaintiff slip and fall. She further stated that she did not observe any foreign substance on the floor on the morning in question nor did she observe any warning signs at the entrance, but that it was the regular practice of defendant's employees to mop the floors of any foreign substances as soon as they became aware of such condition, especially on rainy days. However, she was unable to determine the last time that the floor where plaintiff fell had been mopped on 5 November 1993. Defendant then rested and renewed its motion for a directed verdict, which the trial court again reserved ruling upon.

The jury returned a verdict finding defendant negligent, plaintiff not contributorily negligent, and awarded damages in the amount of \$88,286.95. The trial court then denied defendant's motions for directed verdict, as well as defendant's motion for judgment not withstanding the verdict (JNOV), and entered judgment for plaintiff consistent with the jury's verdict.

Defendant assigns as error the trial court's denial of (1) its motion for summary judgment, and (2) its motions for directed verdict and

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JNOV, on the grounds that the evidence was insufficient to establish that defendant was negligent in causing plaintiff's injuries, and that plaintiff was barred from recovering for his injuries due to his contributory negligence.

[1] As to defendant's first assignment of error, summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c)(1990); *Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 300, 337 S.E.2d 644, 647 (1985), *disc. review allowed*, 315 N.C. 589, 341 S.E.2d 28 (1986). However, summary judgment is a somewhat drastic remedy and should be exercised with caution, especially in cases involving defendant's negligence and plaintiff's contributory negligence. *Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979).

After a careful review of the evidence in this case, we find that a genuine issue of material fact existed as to whether defendant was negligent, as well as whether plaintiff was contributorily negligent. Therefore, the trial court did not err in denying defendant's motion for summary judgment as to both of these issues.

[2] As to defendant's second assignment of error, a motion for directed verdict or JNOV pursuant to Rule 50 of the N.C. Rules of Civil Procedure presents the question of "whether the evidence, when considered in the light most favorable to plaintiff, was sufficient for submission to the jury." *Kelly v. Harvester Co.*, 278 N.C. 153, 157, 179 S.E.2d 396, 397 (1971). Further, similar to cases involving summary judgment:

The heavy burden carried by the movant is particularly significant in cases [where] the principal issues are negligence and contributory negligence. Only in exceptional cases is it proper to enter a directed verdict or a judgment notwithstanding the verdict against a plaintiff in a negligence case.

Taylor v. Walker, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987). This is so because:

[A]pplication of the prudent man test, or any other applicable standard of care, is generally for the jury. Greater judicial caution is therefore called for in actions alleging negligence as a basis for

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plaintiff's recovery or, in the alternative, asserting contributory negligence as a bar to that recovery.

Id. (Citations omitted).

Likewise, directed verdicts or JNOVs are rarely appropriate for issues of contributory negligence and should only be allowed when the "plaintiff's evidence, considered in the light most favorable to him, together with inferences favorable to him that may be reasonably drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn." *Peeler v. Railway Co.*, 32 N.C. App. 759, 760, 233 S.E.2d 685, 686 (1977).

In order for plaintiff to survive a motion for a directed verdict or a JNOV, he must first show a *prima facie* case of negligence. *Lamm v. Bissette Realty*, 327 N.C. 412, 416, 395 S.E.2d 112, 115 (1990); see also *Carter v. Food Lion, Inc.*, 488 S.E.2d 617, 619 (N.C. Ct. App. 1997), disc. review denied, No. 479P97 (N.C. Supreme Court 10 November 1997). Therefore, plaintiff must establish that (1) defendant owed plaintiff a duty of care; (2) defendant's actions or failure to act breached that duty; (3) defendant's breach was the actual and proximate cause of plaintiff's injury; and (4) plaintiff suffered damages as a result of such breach. *Id.*

Since plaintiff entered defendant's store "in response to an express or implied invitation by [defendant] for their mutual benefit," he was an invitee. *David A. Logan and Wayne A. Logan, North Carolina Torts* § 5.20, at 106 (1996); see also *Crane v. Caldwell*, 113 N.C. App. 362, 366, 438 S.E.2d 449, 452 (1994). Therefore, although defendant is not an insurer of the safety of its customers, it does have the duty to:

[K]eep the aisles and passageways of [its] store, where customers are expected to go, in a reasonably safe condition so as not to expose customers unnecessarily to danger, and to give warning of hidden dangers and unsafe conditions of which [it] knows or, in the exercise of reasonable supervision and inspection, should know.

Rives v. Great Atlantic & Pacific Tea Co., 68 N.C. App. 594, 596, 315 S.E.2d 724, 726 (1984); see also *Carter v. Food Lion, Inc.*, 488 S.E.2d at 619.

Defendant is charged with knowledge of a condition which it either negligently created or negligently failed to correct after actual

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or constructive notice of its presence. *Carter v. Food Lion, Inc.*, 488 S.E.2d at 620; *see also Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-343 (1992). "Evidence that the condition (causing the fall) . . . existed for some period of time prior to the fall can support a finding of constructive notice." *Id.* Further, "[w]here there exists a reasonable inference that a condition had existed for such a period of time as to impute constructive knowledge to the defendant proprietor of a dangerous or unsafe condition, it is a question for the jury to decide." *Id.*

At trial, the plaintiff's evidence tended to show that it was raining on the date in question; the floor at the entrance of the store was wet, and had been for at least an hour before plaintiff's fall; no warning signs were present at the time plaintiff entered the store; after walking over a short mat, plaintiff slipped and fell to the ground; while on the ground, plaintiff noticed that his sweatshirt was wet, as was the area of the floor surrounding him; and as plaintiff was sitting on the floor, defendant's employees began bringing mops and warning signs to the area of the store where he had fallen. Further, while Davis testified that it was the normal practice of defendant to mop the floor on a regular basis, especially on rainy days, she could not recall the last time that the floor where plaintiff fell had been mopped on the date in question.

After a careful review, we find that a reasonable trier of fact could conclude that defendant knew or should have known of the presence of water on the floor at the entrance of the store, that defendant failed to warn its customers of its presence, and that as a result, plaintiff injured himself by slipping and falling on the wet floor.

[3] As to defendant's contention that plaintiff was contributorily negligent, our Supreme Court has stated:

The basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for [his] own safety. The question is not whether a reasonably prudent person would have seen [the wet floor] had he or she looked but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor.

Norwood v. Sherwin-Williams Co., 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981). Further, "[a]s a general rule one is not required to anticipate the negligence of others; in the absence of anything which gives

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or should give notice to the contrary, one is entitled to assume and to act on the assumption that others will exercise ordinary care for their own or others' safety." *Id.* at 469, 279 S.E.2d at 563.

Applying these principles to this case, the question is whether the evidence in the light most favorable to the plaintiff allows no reasonable inference except his negligence; *i.e.*, whether "a reasonably prudent and careful person exercising due care for his or her safety would have looked down and seen [the water on the floor]." *Id.* Further, "[a]ny inconsistencies in the evidence should be decided by the jury." *Carter v. Food Lion, Inc.*, 488 S.E.2d at 620.

We conclude that defendant's evidence is insufficient to establish contributory negligence on the part of the plaintiff as a matter of law, but was an issue for the jury to decide from the evidence whether a reasonably prudent person exercising ordinary care would have seen the water on the floor. Therefore, the trial court properly denied defendant's motions for directed verdict and JNOV following the jury's verdict.

No error.

Judges LEWIS and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, PIEDMONT NATURAL GAS COMPANY, INC. (APPLICANT-INTERVENOR), THE PUBLIC STAFF (INTERVENOR), ATTORNEY GENERAL MICHAEL F. EASLEY (INTERVENOR) APPELLEES v. NORTH CAROLINA GAS SERVICE A DIVISION OF NUI CORPORATION (APPLICANT-INTERVENOR) APPELLANT

No. COA97-336

(Filed 6 January 1998)

1. Utilities § 48 (NCI4th)— natural gas service—unserved area—decision between competing applications—facilitation of natural gas expansion

The Utilities Commission's order granting Piedmont's application and denying N.C. Gas's application to provide natural gas service to a portion of Stokes County, including the City of King, facilitates natural gas expansion in unserved areas pursuant to N.C.G.S. § 62-36A where N.C. Gas's proposal was subject to delays, and Piedmont could provide gas service to several industrial facilities in Forsyth County as well as for the King area.

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2. Utilities §§ 27, 48 (NCI4th)—natural gas service—competing applications—traditional funding—weight by Utilities Commission

The Utilities Commission could give the greatest weight to an applicant's plan to use traditional funding rather than expansion funds in deciding between competing applications to provide natural gas service to an unfranchised area.

3. Utilities § 265 (NCI4th)—natural gas service—two suppliers not in public interest—supporting evidence

A finding by the Utilities Commission that it was not in the public interest for the City of King to have two natural gas suppliers was supported by substantial evidence where the Commission heard opinions of citizens in the King area that it would not be in their economic interest and would cause confusion to have two suppliers of the same service, although the Commission also heard contrary opinions by other citizens. The Commission could properly assign more weight to the evidence against having two gas suppliers in the same area.

4. Utilities § 54 (NCI4th)—natural gas franchise—award decades ago—not change of circumstances

The fact that a natural gas supplier was awarded a franchise for Forsyth County decades ago is insufficient to show a change of circumstances requiring a rescission of the supplier's franchise for the public interest.

Appeal by N.C. Gas from order entered 25 October 1996 by the North Carolina Utilities Commission. Heard in the Court of Appeals 30 October 1997.

Burns, Day & Presnell, P.A., by Daniel C. Higgins, for Piedmont Natural Gas Company, Inc., plaintiff appellee.

Public Staff Executive Director Robert P. Gruber, by Chief Counsel Antoinette R. Wike and Staff Attorney Gina C. Holt, for N.C. Utilities, plaintiff appellee.

Poyner & Spruill, L.L.P., by John R. Jolly, Jr., and Nancy Bentson Essex; and McCoy, Weaver, Wiggins, Cleveland & Raper, by Jim Wade Goodman, for N.C. Gas Service, defendant appellant.

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SMITH, Judge.

In 1995, the North Carolina General Assembly enacted N.C. Gen. Stat. § 62-36A, requiring that all areas of the state be assigned to a natural gas local distribution company ("LDC") by 1 January 1997. The North Carolina Utilities Commission ("Commission") entered an order providing that companies could file applications for areas they wished to serve on or before 1 January 1996. After that date, the Commission would assign any remaining unfranchised areas.

On 29 December 1995, North Carolina Gas Service, a division of NUI Corporation ("N.C. Gas"), and Piedmont Natural Gas Company, Inc. ("Piedmont") each filed applications with the Commission requesting certificates of convenience and necessity to provide natural gas service to all or part of Stokes County. N.C. Gas, which was already providing natural gas service in southeastern Stokes County, filed an application requesting authority to provide natural gas service to the remainder of Stokes County. Piedmont, which was providing service in Forsyth County in areas bordered by Stokes County, requested authority to provide service to approximately 100 square miles in southwest Stokes County including the City of King. The Commission consolidated these applications for hearing.

N.C. Gas proposed to construct a new transmission line running 8.5 miles from the Stokes County line near Pilot Mountain along old U.S. 52, which runs to the City of King. This new transmission line would connect to a transmission line which Frontier Utilities of North Carolina, Inc. ("Frontier"), planned to build. In addition, N.C. Gas submitted an alternative proposal which provided for immediate construction of a 15-mile transmission line from Walnut Cove to King. N.C. Gas stated that it would have to be allowed to serve Forsyth County customers in the vicinity of King in order to build the Walnut Cove alternative. Furthermore, N.C. Gas indicated that both of its projects would require the use of expansion funds pursuant to N.C. Gen. Stat. § 62-158 (Cum. Supp. 1996) to assist in financing construction. As of June 1996, N.C. Gas had approximately \$935,000 in refunds escrowed for possible creation of an expansion fund.

In contrast, Piedmont proposed to provide service to King through a 9-mile transmission line from Winston-Salem northward through Forsyth County to King, and through a distribution system in the King area, located in both Forsyth and Stokes Counties. Piedmont did not propose to serve areas of Stokes County outside of King until these areas were developed. Piedmont initially proposed to finance

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its project in part with either expansion funds or through use of a special accounting procedure allowed by the Commission for expansion projects. However, Piedmont eventually decided it would use traditional financing.

Public Staff investigated both proposals and noted that either of N.C. Gas's proposals would be less costly than Piedmont's. However, Public Staff noted that neither N.C. Gas proposal could provide service to the entire City of King since Piedmont was already authorized to serve that part of King located in Forsyth County. In addition, Public Staff only compared N.C. Gas's alternate Walnut Cove plan with Piedmont's plan because of contingencies associated with N.C. Gas's Pilot Mountain plan. Furthermore, Public Staff stated it favored Piedmont's plan because it would provide natural gas to the entire City of King, as well as the two industrial facilities in the King area of Forsyth County.

Public Staff recommended the Commission grant Piedmont's application. On 25 October 1996, the Commission issued an order granting Piedmont's application and denying N.C. Gas's application. N.C. Gas appeals from this order.

N.C. Gen. Stat. § 62-94 (1989) provides the scope of appellate review of a Commission decision. A reviewing court may reverse or modify the Commission decision if substantial rights of an appellant have been prejudiced because the Commission's findings, inferences, conclusions or decisions are: (1) violative of constitutional provisions; (2) beyond the statutory authority or jurisdiction of the Commission; (3) based upon unlawful proceedings; (4) affected by other errors of law; (5) unsupported by competent, material and substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious. *State Utilities Comm'n v. Piedmont Natural Gas Company, Inc.*, 346 N.C. 558, 568-69, 488 S.E.2d 591, 598 (1997).

[1] The first issue is whether the Commission's Stokes County order facilitates natural gas expansion in unserved areas of the State. The test applied by a reviewing court involves a determination of whether, after viewing the entire record, the Commission's findings and conclusions are supported by substantial, competent, and material evidence. *Id.* A general presumption is that the Commission gave proper consideration to all competent evidence presented. *Id.* In addition, a Commission determination is considered *prima facie* just and reasonable. *Id.* at 573, 488 S.E.2d at 601. The reviewing court cannot "set aside the Commission's recommendation merely because different

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conclusions could have been reached from the evidence." *Id.* at 569, 488 S.E.2d at 598.

In the instant case, the record reveals the Commission carefully evaluated the strengths and weaknesses of the N.C. Gas and Piedmont proposals for expansion of gas in unserved areas. N.C. Gen. Stat. § 62-36A(b1) (Cum. Supp. 1996) requires the Commission to consider, among other things, the timeliness each applicant could begin service. The record supports the Commission's conclusion that N.C. Gas's Pilot Mountain proposal was contingent on Frontier's project, thus making this proposal subject to delays. Furthermore, Piedmont could provide gas service to several industrial facilities in Forsyth County as well as for the King area. The record provides substantial evidence that the Commission's order promotes gas expansion in unserved areas. Thus, this assignment of error is overruled.

[2] The second issue is whether Piedmont's decision to use traditional funding instead of expansion funds should be considered a "crucial factor" in assigning the unfranchised area. N.C. Gen. Stat. § 62-158 provides that expansion funds may be used to provide natural gas service to unserved areas "within the company's franchised territory."

[A]ny proclaimed right [N.C. Gas] has to the creation and use of an expansion fund is limited to those areas in which it already possesses a certificate of public convenience and necessity. That "right" does not extend to unfranchised areas, such as the [City of King] area, which [is] the subject of competing certificate applications.

Piedmont Natural Gas, 346 N.C. at 583, 488 S.E.2d at 607.

The Commission has been given the ability to exercise its discretion and judgment in furtherance of its authority and responsibility of regulating public utilities. *Id.* at 575, 488 S.E.2d at 602. The Commission weighs and balances many factors in order to protect the interests and welfare of the general public. *Id.* at 568, 488 S.E.2d at 598. However, "[n]o law prohibits the Commission from giving one factor greater weight than any other." *Id.* at 573, 488 S.E.2d at 601. Thus, because the Commission in its discretion is allowed to give varying weight to the factors based on its interpretation of the legislative intent of the gas expansion statutes, the Commission can give the greatest weight to the sources of funding proposed by the two applicants. *Id.* Furthermore, "it is in the public interest and in accord-

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ance with the policy goals of this state to pursue gas expansion through traditional financing if such an alternative is reasonably available." *Id.* at 585, 488 S.E.2d at 608. Therefore, this assignment of error is overruled.

[3] The third issue is whether the Commission had substantial evidence to support its finding that it was not in the public interest for the City of King to have two natural gas suppliers. Our Supreme Court has held that previously certified utilities have a "right . . . to have an opportunity as a regulated monopoly to render whatever service convenience and necessity may require, and it is only when it has been demonstrated that it is unable either from financial or other reasons to properly serve the public that a competing carrier will be allowed to invade the field." *State, ex rel. Utilities Comm'n v. Carolina Telephone and Telegraph*, 267 N.C. 257, 272, 148 S.E.2d 100, 112 (1966) (citation omitted).

In the instant case, the Commission heard opinions of the citizens in the King area concerning this issue. Some citizens thought that it would not be in their economic interest to have two suppliers of the same service, and that it would lead to confusion. The Commission has the ability to determine the credibility of the evidence presented. *State, ex rel. Utilities Comm'n v. Duke Power Company*, 285 N.C. 377, 390, 206 S.E.2d 369, 378 (1974). The Commission may also use its own expert judgment to determine the weight to be given to the evidence. *Id.* Therefore, the Commission in this case may assign more weight to the evidence against having two suppliers of gas in the same area. Further, there is no suggestion in the record that the public needs or would benefit from having two companies rendering the same service in the King area. Thus, this assignment of error is overruled.

[4] The fourth issue is whether the Commission erred in assuming it could not reassign the area of Forsyth County in and near the City of King to N.C. Gas. N.C. Gen. Stat. § 62-80 (1989) provides that, upon notice, the Commission may "rescind, alter, or amend any order or decision made by it" after giving the public utilities an opportunity to be heard. However, the Commission may not arbitrarily or capriciously rescind its order approving a contract between utilities. *State, ex. rel. Utilities Comm'n v. Carolina Coach Co.*, 260 N.C. 43, 50, 132 S.E.2d 249, 254 (1963). The rescission must be made only due to a change of circumstances requiring it for the public interest. *Id.* In the absence of any additional evidence or a change in conditions, the

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Commission has no power to reopen a proceeding and modify or set aside an order made by it. *Id.*

In the instant case, the record shows that N.C. Gas was initially seeking a franchise solely in Stokes County. N.C. Gas sought a reassignment of Piedmont's franchise in Forsyth County only in the event the Commission deemed it appropriate. Further, N.C. Gas has failed to show any change of circumstances justifying a reassignment. The only evidence N.C. Gas relies on to show the need for a modification is the fact that Piedmont was awarded the franchise for Forsyth County decades ago. This fact alone is insufficient to show a change of circumstances requiring a rescission of Piedmont's franchise for the public interest. *See id.* Thus, this assignment of error is overruled.

In conclusion, substantial evidence supports the Commission's order. Based on the foregoing reasons, the decision of the Commission to grant Piedmont's application and to deny N.C. Gas's application is

Affirmed.

Judges MARTIN, John C., and JOHN concur.

STATE OF NORTH CAROLINA v. JOSHUA ORTEL HATFIELD

No. COA97-183

(Filed 6 January 1998)

1. Jury § 120 (NCI4th)— sexual offenses against child—jury selection—whether jurors thought child abuse victims credible—not allowed—no prejudicial error

There was no prejudicial error in a prosecution for first-degree sexual offenses and taking indecent liberties where defendant was not allowed to ask prospective jurors if they thought that children were more likely to tell the truth when they made allegations of abuse. The question did not fish for an answer to a legal question before the judge had instructed on applicable legal principles, the question was not an attempt to establish a rapport with prospective jurors, it did not ask prospective jurors what kind of a verdict they would render under certain circumstances, and it did not incorporate assumed facts and was not a hypothetical. It simply informed jurors that

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the State would offer a child's testimony and sought to ensure that their impartiality would not be swayed. The question was allowable as a proper inquiry into the jurors' sympathies toward a molested child and the court erred by not allowing it; however, defendant's argument that he was prejudiced amounts to little more than speculation and conjecture.

2. Criminal Law § 741 (NCI4th Rev.)— child sexual abuse—instructions—reference to child as victim

There was no plain error in a prosecution for first-degree sexual offenses and taking indecent liberties where the court referred to the prosecuting witness as a victim fifteen times during the jury charge.

3. Indictment, Information, and Criminal Pleadings § 29 (NCI4th)— sexual offenses against child—dates—sufficiently alleged

The trial court did not err in a prosecution for first-degree sexual offenses and taking indecent liberties by denying defendant's motion to dismiss the indictments. Although defendant wanted to present an alibi defense and argued that the indictments were impermissibly vague about the dates of the offenses, it has been held that an indictment is sufficient if it sets out a time period during which the crime allegedly occurred and that a witness's vagueness as to the date of the offense does not necessarily render an indictment fatally defective.

Appeal by defendant from judgment and commitment entered 24 June 1996 by the Honorable Claude S. Sitton in Graham County Superior Court. Heard in the Court of Appeals 28 October 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Kay Linn Miller Hobart, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

WYNN, Judge.

Joshua Ortel Hatfield was convicted on 24 June 1996 for three counts of first-degree sexual offense and one count of taking indecent liberties with his minor stepdaughter.

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At Hatfield's trial, the minor female testified for the State about several incidents in 1992, when she was nine years old, during which Hatfield fondled and penetrated her. Also testifying for the State was social worker Buddy Morris, who stated that the minor female talked to him and revealed that Hatfield had abused her. She initially told him that the abuse began in 1994, but later said that it started in 1992.

Richard Phillips, a friend of the stepdaughter, testified that in 1995 he saw her crying and when he asked what was wrong she told him that Hatfield had put his penis in her mouth three years earlier. Detective Rocky Sampson testified that he interviewed the stepdaughter in 1995, but was unable to ascertain exact dates of the alleged incidents.

I.

[1] Hatfield first argues that the trial court committed reversible error by not allowing him to ask prospective jurors if they thought that children were more likely to tell the truth when they made allegations of sexual abuse.

In *State v. Phillips*, our Supreme Court summarized the rules guiding questioning of prospective jurors during *voir dire*:

Counsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. Counsel should not argue the case in any way while questioning the jurors. Counsel should not engage in efforts to indoctrinate, visit with or establish 'rapport' with jurors. Jurors should not be asked what kind of verdict they would render under certain named circumstances.

300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980).

In *State v. Clark*, 319 N.C. 215, 353 S.E.2d 205 (1987), the prosecutor pointed out during *voir dire* that the State's case was circumstantial and asked the potential jurors: "Does the fact that there are no eyewitnesses cause you any problems?" *Id.* at 220, 353 S.E.2d at 207. The defendant raised several objections to this question, but our Supreme Court found no error. *Id.* at 220-22, 353 S.E.2d at 207-08. The Court recited the language quoted *supra* from *Phillips*, and then stated:

We hold that the question by the prosecuting attorney does not violate any of the rules enunciated in *Phillips*. It does not fish for answers to legal questions before the judge has instructed the

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jury. It merely informs the jurors that the State will rely on circumstantial evidence and asks them whether a lack of eyewitnesses could cause them problems. The prosecuting attorney was not arguing with the jury or attempting to establish 'rapport' with them. The question was certainly not designed to ask what kind of verdict the jury would render under certain named circumstances. The question is not, as contended by the defendant, improperly argumentative. It does not incorporate within the question assumed facts. The question is not hypothetical. The State did rely to a great degree on circumstantial evidence. It does not improperly 'precondition' the jurors to believe there were no eyewitnesses. No eyewitness testified.

Id. at 221-22, 353 S.E.2d at 208.

In *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *sentence vacated*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), the prosecutor asked several prospective jurors whether they would be sympathetic toward a defendant who was intoxicated at the time of the offense. *Id.* at 13-14, 372 S.E.2d at 18-19. Our Supreme Court stated:

The questions here were properly allowed as an inquiry into the jurors' sympathies toward an intoxicated person. They did not contain incorrect or inadequate statements of law, nor were they ambiguous or confusing. Moreover, they did not tend to 'stake out' the jurors as to their potential verdict or how they would vote under a given state of facts. The questions did not 'fish for answers to legal questions before the judge ha[d] instructed the jury.'

Id. at 15, 372 S.E.2d at 19 (citation omitted) (alteration in original).

In this case, asking a prospective juror whether he or she would think that children were more likely to tell the truth when they made allegations of sexual abuse was a proper inquiry into the jurors' sympathies. The question did not fish for an answer to a legal question before the judge had instructed on applicable legal principles. Furthermore, the question was not an attempt to establish a "rapport" with the prospective jurors, nor did it ask the prospective jurors what kind of verdict they would render under certain circumstances. Additionally, the question was not an argument—it did not incorporate assumed facts and was not a hypothetical. Rather, it simply informed the jurors that the State would offer a child's testimony and sought to ensure that their impartiality would not be swayed. The

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State did in fact rely to a great degree on the testimony of a sexually abused child. In sum, the question was allowable as a proper inquiry into the jurors' sympathies toward a molested child, and as such is indistinguishable from the question our Supreme Court found permissible in *McKoy*. Accordingly, we hold that the trial court erred by not allowing Hatfield to ask it.

We next consider whether the error was prejudicial. Regulation of *voir dire* inquiries is within the trial court's discretion, *State v. Avery*, 315 N.C. 1, 20, 337 S.E.2d 786, 796-97 (1985), and its decisions will not be overturned absent an abuse of discretion, *State v. Mash*, 328 N.C. 61, 63-64, 399 S.E.2d 307, 309 (1991).

Hatfield argues that the trial court's action denied him a fundamentally fair trial. He cites *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 258 (1976) for the proposition that a new trial is required where a trial court's restriction on jury selection denies the defendant a fundamentally fair trial. He points out that the stepdaughter's testimony and previous statements were the only evidence implicating him. As a result, the stepdaughter's credibility was pivotal and if the jurors believed that children do not make false claims of abuse, then they would have impermissibly discounted evidence about the stepdaughter's dislike of Hatfield and the lapse of time between the incidents and her reporting them. He therefore contends that under *Ristaino v. Ross*, 424 U.S. 589, 47 L. Ed. 2d 258 (1976), because the trial court refused questioning in an area where the jury was likely to have biases, he has been denied a fundamentally fair trial as a matter of law.

We are not persuaded that Hatfield was prejudiced. *Morgan* was concerned with whether a trial court could "refuse inquiry into whether a potential juror would automatically impose the death penalty upon conviction of the defendant." *Id.* at 721, 119 L. E. 2d at 497. The question in the present case is obviously distinguishable from *Morgan* because it related to potential bias, not to an automatic death sentence imposition.

Furthermore, we note that the Court in *Ristaino* said that "[t]he Constitution does not always entitle a defendant to have questions posed during *voir dire* specifically directed to matters that conceivably might prejudice veniremen against him.... The State's obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant." *Id.* at 594-95, 47 L. E. 2d at 263 (footnote omitted).

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In this case, Hatfield's argument that he was prejudiced amounts to little more than speculation and conjecture. We are not persuaded that he was prejudiced, and accordingly we hold that no reversible error occurred when the trial court denied him the opportunity to ask the question.

II.

[2] Hatfield next argues that the trial court committed reversible error by referring to the prosecuting witness as a "victim" fifteen times during the jury charge. However, even though given a specific opportunity to do so, Hatfield's lawyer did not object to the use of the term at trial and our review is limited to plain error. Although we note his arguments to the contrary, we have previously held that a trial court did not commit plain error by referring to the prosecuting witness as a victim. *State v. Richardson*, 112 N.C. App. 58, 67, 434 S.E.2d 657, 663 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 132 (1994). Accordingly, we hold that no reversible error occurred.

III.

[3] Hatfield finally argues that the trial court erred by denying his motion to dismiss the indictments. Hatfield contends that the indictments against him were impermissibly vague because they alleged that the criminal acts occurred on or about dates in August 1992. Hatfield wanted to present an alibi defense, and in order to do so he was forced to attempt to explain where he was during the entire summer. However, as he concedes in his brief, we have previously held that an indictment is sufficient if it sets out a time period during which the crime allegedly occurred. *State v. Oliver*, 85 N.C. App. 1, 7-8, 354 S.E.2d 527, 531, *disc. review denied*, 320 N.C. 174, 358 S.E.2d 64 (1987) (discussing N.C. Gen. Stat. § 15A-924(a)(4), which sets out the requirements for a criminal pleading). Further, a witness's vagueness as to the date of an offense does not necessarily render an indictment fatally defective. See *State v. Ramey*, 318 N.C. 457, 472, 349 S.E.2d 566, 575-76 (1986). Accordingly, we hold that the trial court did not err by denying Hatfield's motion to dismiss.

Thus, in the trial of Joshua Ortel Hatfield, we find,

No prejudicial error.

Judges EAGLES and MARTIN, Mark D., concur.

RYAN v. U.N.C. HOSPITALS

[128 N.C. App. 300 (1998)]

IN THE MATTER OF CHRISTOPHER PATRICK RYAN, M.D., PLAINTIFF v. UNIVERSITY OF NORTH CAROLINA HOSPITALS, KENNETH G. REEB, M.D., WARREN P. NEWTON, M.D., BRON D. SKINNER, PH.D., SAMUEL WEIR, M.D., AND PETER CURTIS, M.D. DEFENDANTS

No. COA97-209

(Filed 6 January 1998)

Colleges and Universities § 13 (NCI4th)— medical resident—family practice—absence of rotation in gynecology—breach of contract—statement of claim

A medical resident in a university's family practice program stated a claim against the university for breach of contract where he alleged that the university breached the "Essentials of Accredited Residencies" by its failure to provide him a one-month rotation in gynecology.

Appeal by plaintiff from order entered 4 May 1995 by Judge F. Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 9 October 1997.

Egerton & Brenner, by Lawrence H. Brenner, and Maready Comerford & Britt, L.L.P., by Gary V. Mauney, for plaintiff-appellant.

Bell, Davis & Pitt, by Joseph T. Carruthers, for the University-appellee.

LEWIS, Judge.

Plaintiff appeals the trial court's order dismissing his complaint for failure to state a claim pursuant to North Carolina Rule of Civil Procedure 12(b)(6). Plaintiff contends that he has alleged facts sufficient to give rise to a claim basis of breach of contract. Specifically, plaintiff argues that he contracted with the University of North Carolina Hospitals ("the University") to provide low-cost medical services in exchange for a training program that complied with the "Accreditation Council for Graduate Medical Education." The University responds that plaintiff's general allegations criticize the quality and substance of the residency program he received. As a result, the University maintains that plaintiff's claim is really one for educational malpractice, a claim that should not be recognized. We reverse.

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Under the terms of the National Residency Program, residency programs and future residents are "matched" according to their respective preferences. A resident is both a graduate medical student and an employee. The resident receives educational training in the area of the program's medical specialization.

Plaintiff, a 1986 graduate of Georgetown Medical School, was matched with the University of North Carolina Family Practice Program. Plaintiff and the University entered into a one-year written contract that was renewable, upon the University's approval, each of the three years of the residency program. The typical family practice residency is three years.

Plaintiff's residency began 1 July 1990. Sometime during plaintiff's second year of residency, problems developed. The University planned to terminate the residency. Plaintiff retained counsel and used the internal appeal procedures. Thereafter, the parties executed a contract at the beginning of plaintiff's third year which stated in part that plaintiff knew he might graduate as much as six months later than the normal program. In fact, plaintiff graduated only three months later than normal. It is undisputed plaintiff graduated from an accredited residency program.

Plaintiff initiated this action alleging breach of contract, educational malpractice, intentional and negligent infliction of emotional distress, civil conspiracy, tortious interference with prospective business relationship, and self-defamation against the defendants. The trial court granted the University's motion to dismiss all allegations. Plaintiff appeals only the dismissal of his breach of contract claim against the University.

On appeal, plaintiff characterizes his relationship with the University as principally one of contract. He contends that he and the University simply executed an employment contract whereby plaintiff worked for a "substandard wage" in "partial consideration" for a "training program in full compliance with the Accreditation Council for Graduate Medical Education Residency Review Committee." The University contends that plaintiff's claim is merely a restatement of his educational malpractice claim, which the trial court dismissed and from which plaintiff has not appealed. This is a case of first impression for the North Carolina courts. However, other jurisdictions have found that a student can bring an action for breach of contract arising from a dispute related to an "educational contract." See, e.g., *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992).

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In *Ross*, a former student sued for negligence and breach of contract. 957 F.2d at 411. He alleged that Creighton recruited him despite its knowledge that he was not educationally prepared to perform college work, and that Creighton failed to provide any real access to its academic curriculum, as promised in return for his playing basketball. *Id.* at 411. The Seventh Circuit Court of Appeals held that Illinois did not recognize a cause of action for educational malpractice, and that the student could not recover under Illinois law for negligent admission, but the court did find that the student had stated a claim for breach of contract. *Id.* In analyzing the plaintiff's breach of contract claim the court reasoned,

Where the essence of the complaint is that the school breached its agreement by failing to provide an effective education, the court is again asked to evaluate the course of instruction . . . [and] is similarly called upon to review the soundness of the method of teaching that has been adopted by an educational institution[.]

Id. at 416.

The court refused to review the general quality of the educational program, but recognized certain narrow circumstances under which a plaintiff could allege a *reviewable* breach of contract. *Id.* "To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough." *Id.* at 417. Instead, he must point to an identifiable contractual promise that the University failed to honor. *Id.* The plaintiff in *Ross* alleged that Creighton had made specific promises that, *inter alia*, he would receive a tutor, that he would be required to attend tutoring sessions, and that time would be made available for him to attend the sessions in order to make the educational environment accessible to him. Thus, the *Ross* court found that the plaintiff had a claim for breach of contract on the basis of the University's specific promises. The court noted, "[r]uling on this issue would not require an inquiry into the nuances of educational processes and theories, but rather an objective assessment of whether the institution made a good faith effort to perform on its promise." *Id.*

In the instant case, plaintiff makes several allegations in support of his breach of contract claim against the University. Only one, however, alleges a specific aspect of the contract that would not involve an "inquiry into the nuances of educational processes and theories." Plaintiff alleges that the University breached the "Essentials of Accredited Residencies" by "the failure to provide a one month rotation

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in gynecology." In ruling upon a motion to dismiss, the question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Id.*

Accordingly, we find that plaintiff has alleged facts sufficient to support his claim for breach of contract on the basis of the University's failure to provide him a one month rotation in gynecology.

The trial court's order is reversed.

Reversed.

Judges MARTIN, John C. and TIMMONS-GOODSON concur.

MARY HOWARD, EMPLOYEE, PLAINTIFF, v. SQUARE-D COMPANY, EMPLOYER, AND SELF-INSURED (JAMES C. GREEN AND COMPANY, SERVICING AGENT), DEFENDANT

No. COA97-521

(Filed 6 January 1998)

1. Workers' Compensation § 353 (NCI4th)—occupational disease—time for filing claim

The two-year period within which a claim for benefits for an occupational disease must be filed begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, and the employee is informed by competent medical authority of the nature and work-related cause of the disease. N.C.G.S. § 97-58.

2. Workers' Compensation § 353 (NCI4th)—carpel tunnel syndrome—time for filing claim—beginning of two-year period

The two-year period for plaintiff to file a claim for disability benefits for carpel tunnel syndrome did not begin when she took a leave of absence for six days after being informed by her doctor that she had this occupational disease since this leave of absence was not compensable for a disability; rather, the two-year period

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commenced at a subsequent time when plaintiff was unable to earn wages for four weeks. N.C.G.S. § 97-28.

Appeal by plaintiff from opinion and award of the Industrial Commission entered 21 January 1997. Heard in the Court of Appeals 3 December 1997.

Young, Moore & Henderson, P.A., by John A. Michaels and Dawn M. Dillon, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by Dayle Flammia, for defendant-appellee Square-D Company.

LEWIS, Judge.

Plaintiff appeals an order of the Industrial Commission that concluded that she had not filed her claim for occupational disease within the two-year period prescribed by N.C. Gen. Stat. § 97-58 (1991). As a result, the Commission held that it did not have jurisdiction over the claim and her right to compensation was consequently barred. We reverse.

Plaintiff is 49 years of age and has a high school diploma. She began working for defendant employer on 11 November 1987 and worked full time in various jobs until 24 January 1992. She performed assembly work as a machine operator for the first year of her employment and then worked as a gluing operator until January 1991. As a gluing operator, plaintiff assembled parts by using her hands to handle and rotate small steel parts in order to glue a shading coil onto them. Plaintiff would assemble 400 to 600 parts per eight-hour shift depending upon the size of the part.

In the summer of 1990, plaintiff began experiencing symptoms primarily after work, including pain in her left wrist, trouble lifting and grasping with her left hand, and numbness and tingling in her left hand, which caused pain in her left middle finger and right elbow.

Plaintiff first sought medical treatment for her left hand and wrist, and right elbow symptoms in June 1990. Between June 1990 and 11 September 1990, plaintiff received regular, conservative medical treatment for her left hand and left wrist symptoms. Her physician also restricted her to light duty work and prohibited repetitive activity. On 11 September 1990, plaintiff's doctor informed her that she had left carpal tunnel syndrome. From 11 September 1990 through 17 September 1990, plaintiff did not work and instead took a

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leave-of-absence from employer and received voluntary short term disability benefits provided by employer. Plaintiff returned to work after a six-day leave and worked continuously until 24 January 1992. At that time her left wrist was placed in a cast for four weeks and she was unable to work. Following a series of short unsuccessful returns to work and stints in alternative replacement jobs, plaintiff filed Industrial Commission Form 18, Notice of Accident to Employer, on 25 February 1993 seeking compensation for her occupational disease.

The Full Commission issued an opinion and award 21 January 1997 affirming the deputy commissioner's dismissal of plaintiff's claim. In particular, the Commission found:

7. From 11 September 1990 through 17 September 1990, plaintiff was unable to earn the wages she was earning on 11 September 1990 in the same or in any other employment as a result of her left carpal tunnel syndrome, during which time plaintiff took a leave-of-absence from her employment with defendant employer.

9. Plaintiff failed to file a claim for her left carpal tunnel syndrome both within two years of the date she was first advised by a competent medical authority that she had left carpal tunnel syndrome and that the same was work related, and within two years of the date on which she first became unable to earn the wages she was earning on 11 September 1990 in the same or in any other employment as a result of her left carpal tunnel syndrome.

Commissioner Bernadine Ballance filed a dissenting opinion. Plaintiff appeals.

[1] The issue presented by this appeal is whether the plaintiff filed her claim within the time prescribed by G.S. 97-58. G.S. 97-58 provides in relevant part:

(b) . . . The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.

(c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be.

Our Supreme Court held in *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980), that subsections (b) and (c) of G.S. 97-58,

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supra, must be construed in pari materia. When so construed, the Court held that the two-year period within which claims for benefits for an occupational disease must be filed begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, and the employee is informed by competent medical authority of the nature and work-related cause of the disease. *Id.* at 98-99, 265 S.E.2d at 147. Moreover, the two-year period for filing claims for an occupational disease does not begin to run until all of these factors exist. *Dowdy v. Fieldcrest*, 308 N.C. 701, 706, 304 S.E.2d 215, 218-19.

[2] It is clear from the record that plaintiff was “informed by competent medical authority” of her occupational disease on 11 September 1990. Thus, the critical question is at what time did plaintiff become incapable of earning, at any job, the wages she was receiving prior to her disability. Defendant employer contends that plaintiff’s disability commenced 11 September 1990 when she took a leave of absence for six days after being informed by her doctor of her disease. Plaintiff contends that her inability to work for six days is insufficient under the Workers’ Compensation Act, as a matter of law, to claim a disability. General Statute section 97-54 provides that in all cases of occupational disease other than asbestosis or silicosis, “disablement shall be equivalent to disability as defined in G.S. 97-2(9).” N.C. Gen. Stat. § 97-2(9) (1991) provides, “The term disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” However, N.C. Gen. Stat. § 97-28 (1991), provides:

No compensation . . . shall be allowed for the first seven calendar days of disability resulting from an *injury* . . . Nothing in this section shall prevent an employer from allowing an employee to use paid sick leave, vacation or annual leave, or disability benefits provided directly by the employer during the first seven calendar days of a disability.

(emphasis added).

The Workers’ Compensation Act treats an occupational disease as an injury and applies all applicable provisions thereto; “[d]isablement . . . of an employee from an occupational disease described in G.S. 97-53 shall be treated as the happening of an injury by accident within the meaning of the . . . Act.” N.C.G.S. § 97-52 (1991). Thus, con-

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struing the aforementioned statutes together, plaintiff's six day leave-of-absence was uncompensable under the Act for disability compensation. Plaintiff did not incur a compensable period of disability until 24 January 1992 when she was unable to earn wages for four weeks. It was at that time that both factors under *Taylor* existed, and at that time that the statute began to run on her claim for occupational disease. Thus, plaintiff had two years from 24 January 1992 in which to file her claim with the Industrial Commission. Plaintiff filed her claim 25 February 1993; therefore, her claim was timely filed.

Therefore, the opinion and award of the Industrial Commission is hereby

Reversed.

Judges WALKER and TIMMONS-GOODSON concur.

THE NEWS AND OBSERVER PUBLISHING COMPANY, INC.; CAPITOL BROADCASTING COMPANY, INC.; ABC, INC.; NATIONAL BROADCASTING COMPANY; WLFL, INC.; NORTH CAROLINA PRESS ASSOCIATION; AND NORTH CAROLINA ASSOCIATION OF BROADCASTERS, INC. v. PAUL COBLE; TOM FETZER; MARC SCRUGGS, JR.; AND KIERAN SHANAHAN

No. COA97-503

(Filed 6 January 1998)

1. Appeal and Error § 175 (NCI4th)— Open Meetings Law violation—prior judgment in another action—present action not moot

Plaintiffs' action seeking (1) a declaratory judgment that a gathering of the mayor and four city council members at one member's home to discuss a proposed sports arena violated the Open Meetings Law and (2) an injunction against future violations of the Open Meetings Law was not rendered moot by the resolution of another action that sought only prospective relief based upon the same gathering of defendants where defendants agreed in the prior action not to violate the Open Meetings Law in the future, but there was no conclusion that defendants' conduct violated the Open Meetings Law, and the prior judgment thus did not provide all of the relief sought by plaintiffs in this case.

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2. Judgments § 300 (NCI4th)— Open Meetings Law violation—prior judgment—different plaintiffs and issues—res judicata and collateral estoppel inapplicable

An action seeking a declaratory judgment that the mayor and city council members violated the Open Meetings Law in a gathering at one member's home was not barred on grounds of res judicata or collateral estoppel by a judgment in a prior action that sought only prospective relief concerning the same gathering of the defendants since the issues raised by plaintiffs in this action were not litigated in the prior action, and the plaintiff in the prior action is different and not in privity with the plaintiffs in this action.

3. State § 9 (NCI4th)— Open Meetings Law—attorney fees—prevailing party

N.C.G.S. § 143-318.16B does not apply to permit an award of attorney fees to defendants in an action for a declaratory judgment under the Open Meetings Law where defendants are no longer the prevailing party.

Appeal by plaintiffs from judgment entered 7 February 1997 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 2 December 1997.

Plaintiffs filed a complaint 28 January 1997 pursuant to the North Carolina Open Meetings Law, G.S. 143-318.16, and the Declaratory Judgment Act, G.S. 1-253, against the defendants who at the time were Mayor of Raleigh and four elected City Council members. Plaintiffs allege on information and belief that the defendants had gathered together unlawfully in an unannounced meeting in which they deliberated regarding matters of public business within the jurisdiction of the city council and, in particular, matters relating to a proposed sports arena. Plaintiffs sought 1) a declaratory judgment that the gathering constituted an "official meeting" held in violation of the Open Meetings Law; 2) an order permanently enjoining defendant from future violations of the Open Meetings Law; 3) permission to expedite discovery; and 4) attorneys' fees as permitted under G.S. 143-318.16B. Defendants moved pursuant to Rule 12(b)(6) to dismiss the complaint. On 7 February 1997 Judge Farmer dismissed plaintiffs' complaint and in a subsequent order awarded attorneys' fees to the defendants in the amount of \$10,000. Judge Farmer's order stated that the plaintiffs' complaint was a "duplicate action" substantially identi-

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cal to *Eltинг v. Fetzer et al.*, a separate action arising out of the same gathering of defendants which reached disposition on 31 January 1997.

Plaintiffs allege that defendants, Mayor Tom Fetzer and City Council Members Paul Coble, John Odom, Marc Scruggs, Jr., and Kieran Shanahan, violated the Open Meetings Law when they gathered at the home of Paul Coble, 19 January 1997, without notice to the public or other members of the City Council, and discussed the City's involvement in the proposed sports arena. Plaintiffs further allege that no minutes of the meeting were kept and that defendants intended to conceal the meeting from the public and purposefully attempted to evade the Open Meetings Law. Judge Farmer granted the defendants' Rule 12(b)(6) motion and ordered plaintiffs to pay the defendants' attorney fees. Plaintiffs appeal.

Everett, Gaskins, Hancock & Stevens, by Hugh Stevens and Amanda Martin, for plaintiff-appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Wade H. Hargrove, Mark J. Prak and Wayne A. Logan, for plaintiff-appellants.

Eugene Boyce for defendant-appellees.

EAGLES, Judge.

[1] We first consider whether the trial court erred in granting defendants' motion to dismiss for failure to state a claim for which relief can be granted. The question for the trial court on a motion to dismiss under Rule 12(b)(6) is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB Nat'l Bank of North Carolina*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In analyzing the sufficiency of the complaint under subsection (b)(6) of Rule 12, the complaint must be liberally construed. *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987). The parties agree that the complaint stated a claim for relief. The issue here is whether the disposition of the *Eltинг* case pursuant to G.S. 1A-1, Rule 68 on 31 January 1997 renders this action moot.

In this context, mootness arises "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no

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longer at issue. *In Re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), cert denied, 442 U.S. 929, 61 L.E.2d 297 (1979). When an action has become moot, the case should be dismissed. *Id.*

Defendants argue that this action and the *Elting* suit (which was resolved) are identical and consequently this action should be dismissed. Plaintiffs disagree and respond that they are seeking different relief than Mr. Elting sought. We agree. Mr. Elting's lawsuit sought only prospective relief by requesting the court to "enjoin future violations" of the Open Meetings Law and did not seek declaratory relief. By contrast, plaintiffs in this action sought not only to bar future violations through injunctive relief but to establish by means of declaratory judgment that a purposeful violation of the Open Meetings Law had in fact occurred. Plaintiffs also sought to discover what business was transacted at the alleged official meeting. In the resolution reached in *Elting*, defendants merely agreed to not violate the Open Meetings Law in the future but did not concede or stipulate that their conduct violated the Open Meetings Law. The *Elting* judgment did not provide all of the relief sought by the plaintiffs in the instant case. In the *Elting* case, the judgment included no legal conclusion stating what the defendants did wrong. Without declaratory relief, the defendants will be free to continue their previous conduct, complained of here, because the *Elting* judgment never concluded, and defendants never conceded, that defendants' conduct was a violation of the Open Meetings Law. Accordingly, we conclude that the trial court erred when granting defendants' Rule 12(b)(6) motion.

[2] The defendants next argue that res judicata and collateral estoppel justify the dismissal of plaintiffs' complaint. We disagree.

[A] judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

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Edwards v. Edwards, 118 N.C. App. 464, 467-68, 456 S.E.2d 126, 128 (1995) (quoting *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 427, 349 S.E.2d 552, 556 (1986)). Thus, res judicata “precludes a subsequent action based on the same claim, collateral estoppel in the latter instance bars subsequent determination of the same issue, even though the action may be premised upon a different claim.” *Id.* at 468, 456 S.E.2d at 128.

Here there were different issues as well as different parties. The plaintiffs in the instant action are seeking not only injunctive relief as did the plaintiff in the *Elting* suit, but they are also seeking declaratory relief. Consequently, the issues raised by the plaintiffs here were never litigated and are not barred from being raised in this action. In addition, the plaintiff in the *Elting* suit is different from and not in privity with the plaintiffs in this action. Res judicata and collateral estoppel did not justify the dismissal of plaintiffs’ action here. Accordingly, the judge erred when granting defendants’ Rule 12(b)(6) motion.

[3] The next issue deals with whether the trial court erred when it taxed \$10,000 in attorneys’ fees against the plaintiffs. Because the defendants are no longer the prevailing party as to the first issue, G.S. 143-318.16B does not apply. It is important to note that G.S. 143-318.16B, as amended effective 1 October 1994, states:

When an action is brought pursuant to G.S. 143-318.16 or G.S. 143-318.16A, the court may make written findings specifying the prevailing party or parties, and **may** award the prevailing party or parties a reasonable attorney’s fee, to be taxed against the losing party or parties as part of the costs. (Emphasis added).

The award of attorneys’ fees is discretionary with the trial court. The trial court is authorized but no longer required to award attorneys’ fees to the prevailing party.

Reversed and remanded.

Judges WYNN, and MARTIN, John C., concur.

KENNEDY v. HAWLEY

[128 N.C. App. 312 (1998)]

MARTY C. KENNEDY, PLAINTIFF v. CLARICE HAWLEY, ADMINISTRATRIX OF KEITH RAY HAWLEY, DECEASED, DEFENDANT

No. COA97-245

(Filed 6 January 1998)

Animals, Livestock, or Poultry § 8 (NCI4th)—negligence action—dog chasing bicycle—no previous instances—summary judgment for defendant—improper

The trial court erred by granting summary judgment for defendant in a negligence action which resulted from defendant's dog charging at plaintiff while plaintiff rode her bicycle, causing plaintiff to fall and suffer injuries. Although defendant presented ample evidence that he had no knowledge that the dog had chased bicyclists in the past, this does not satisfy defendant's burden of showing that plaintiff cannot present evidence that defendant was aware or should have been aware that his dog was likely to chase bicyclists. Whether a dog is likely to chase a bicyclist requires a consideration of various factors.

Appeal by plaintiff from order filed 19 December 1996 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 27 October 1997.

Michael B. Brough & Associates, by Alison A. Erca, for plaintiff appellant.

Battle, Winslow, Scott & Wiley, P.A., by J. Brian Scott and M. Greg Crumpler, for defendant appellee.

GREENE, Judge.

Marty C. Kennedy (Plaintiff) appeals entry of summary judgment for Keith Ray Hawley (Defendant).

On 19 September 1990, Defendant took his fifteen-month-old dog, a Labrador retriever named Ranger, to Birchwood Country Club to fetch sticks. Ranger was not restrained by a leash, but had been trained to sit and stay on Defendant's command. Plaintiff was bicycling down an adjacent road when Ranger "charged" her bicycle, causing Plaintiff to fall onto the pavement and to sustain injuries to her head and shoulder. Following the accident, Plaintiff was treated for vertigo, a condition causing unexpected dizziness. No evidence

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was presented which would tend to show that Ranger had ever "charged" anyone on any prior occasion.

On 30 July 1993, Plaintiff filed a complaint alleging negligence per se for Defendant's violation of the animal control ordinances of Nash County and the Town of Nashville (Ordinances). Plaintiff sought relief for damages sustained as a result of her encounter with Ranger. On 20 December 1993, Plaintiff again fell and sustained injuries when she suffered an attack of vertigo while riding her bicycle.

Defendant filed a motion for summary judgment alleging that there was "no evidence that Plaintiff's [sic] dog prior to September 19, 1990 had chased . . . bicyclists," and in the alternative requested partial summary judgment as to damages resulting from Plaintiff's 20 December 1993 fall. The trial court granted Defendant's motion for summary judgment as to Plaintiff's entire claim.

The issue is whether Defendant has met his burden of showing that there is no genuine issue of material fact as to whether Defendant knew or should have known that his dog was likely to chase a bicyclist.

Summary judgment is appropriate only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Gardner v. Gardner*, 334 N.C. 662, 665, 435 S.E.2d 324, 326-27 (1993) (quoting N.C.G.S. § 1A-1, Rule 56(c) (1990)). It is the burden of the party moving for summary judgment to establish the lack of any genuine issue of material fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (citing *Texaco, Inc. v. Creel*, 310 N.C. 695, 699, 314 S.E.2d 506, 508 (1984)). The moving party may meet this burden by showing that "an essential element of the opposing party's claim is nonexistent" or that the opposing party will not be able to "produce evidence to support an essential element of the claim . . ." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

The Ordinances at issue provide: "It shall be unlawful for an owner or keeper to permit an animal or animals to create a nuisance, or to maintain a nuisance created by an animal or animals." Nash County, N.C., *Ordinances* § V(A) (1986); Nashville, N.C., *Ordinances* art. I, § 3-6 (1987) (emphasis added). The words "to permit" have been construed by our courts to mean an acquiescence with knowledge.

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Underwood v. Board of Alcoholic Control, 278 N.C. 623, 630, 181 S.E.2d 1, 6 (1971). Knowledge may be implied from the circumstances, *id.* at 632, 181 S.E.2d at 7, and in the context of a civil case, a person is “held to know that which he would have known had he exercised that degree of care which a reasonably prudent man would have exercised under similar circumstances,” *State v. Stathos*, 208 N.C. 456, 457, 181 S.E. 273, 274 (1935). A “nuisance” is: “An animal [that] chases, snaps at, harasses or impedes pedestrians, bicyclists or vehicles.” Nash County, N.C., *Ordinances* § I(E); Nashville, N.C. *Ordinances* art. I, § 3-1. A dog owner, therefore, violates the Ordinances when he creates a situation where his dog can chase a bicyclist and the owner knew or should have known that such an occurrence was likely.

Although Defendant’s required knowledge may be shown through previous instances of chasing known to Defendant, this is not the exclusive method of showing Defendant’s knowledge that his dog is likely to chase a bicyclist. Whether a dog is likely to chase a bicyclist requires a consideration of various factors including the “size, nature and habits of the dog, known to the owner” *Miller v. Snipes*, 12 N.C. App. 342, 346, 183 S.E.2d 270, 273 (quoting *Sink v. Moore*, 267 N.C. 344, 350, 148 S.E.2d 265, 270 (1996)), cert. denied, 279 N.C. 619, 184 S.E.2d 883 (1971); see *State v. Powell*, 336 N.C. 762, 772, 446 S.E.2d 26, 32 (1994) (“[K]nowledge of [a dog’s] vicious propensities is not the only evidence that will support a conclusion that injury was foreseeable.”). Any knowledge Defendant may or may not have had about Ranger chasing others in the past “would be a circumstance to be weighed with [other factors] disclosed by the evidence.” *Lloyd v. Bowen*, 170 N.C. 216, 220, 86 S.E. 797, 798 (1915).

In this case, Defendant presented ample evidence at the summary judgment hearing that he had no knowledge that Ranger had chased bicyclists in the past. This evidence, however, does not satisfy Defendant’s burden of showing that Plaintiff cannot present other evidence showing that Defendant was aware or should have been aware that his dog was likely to chase bicyclists. Summary judgment for Defendant was therefore error.

We do not address Defendant’s alternative motion for summary judgment, as that matter was not addressed by the trial court.

Reversed and remanded.

Chief Judge ARNOLD and Judge McGEE concur.

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{128 N.C. App. 315 (1998)}

STATE OF NORTH CAROLINA v. CURTIS WAYNE WILKINS

No. COA96-1507

(Filed 6 January 1998)

**Criminal Law § 1093 (NCI4th Rev.)— Structured Sentencing—
prior record points—appeal from district to superior court
withdrawn—remanded to district court—session at which
conviction occurred**

The trial court did not err when sentencing defendant for assault with a deadly weapon inflicting serious injury in its determination of prior record points pursuant to N.C.G.S. § 15A-1340.14(b) where defendant had appealed a district court conviction to superior court and then withdrew the appeal, so that the matter was remanded to district court, and the superior court treated the remanded conviction separately from other convictions and awarded an extra point. Although the record did not show the date the case was taken back to district court and defendant contended that it must have been at the same session as the other convictions, so that only one may be used in determining prior record level, when a defendant withdraws his appeal to the superior court and the case is remanded to the district court, it is as though the appeal had not been taken and defendant's conviction of the offense occurred upon the date of the entry of judgment in district court.

N.C.G.S. § 15A-1340.14(d).

Appeal by defendant from judgment entered 13 August 1996 by Judge William C. Griffin, Jr., in Beaufort County Superior Court. Heard in the Court of Appeals 9 September 1997.

Attorney General Michael F. Easley, by Associate Attorney General Teresa L. Harris, for the State.

Wayland J. Sermons, Jr., for defendant-appellant.

MARTIN, John C., Judge.

Defendant appeals from a judgment imposing an active sentence of a minimum term of 30 months and a maximum term of 45 months entered upon his conviction of assault with a deadly weapon inflicting serious injury, a Class E felony. His only assignment of error is to

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the trial court's determination of his prior record points pursuant to G.S. § 15A-1340.14(b). We affirm.

The trial court determined that defendant's five (5) prior record points, based upon convictions of one Class H felony and three Class 1 misdemeanors, resulted in a prior record level of III pursuant to G.S. § 15A-1340.14(c), and imposed a sentence within the presumptive range. Defendant argues the trial court erred in separately assessing prior record level points for two Class 1 misdemeanor convictions which he contends occurred at the same session of district court.

Defendant premises his argument upon the following facts: On 9 August 1990 defendant was convicted in the Beaufort County District Court for communicating threats, a Class 1 misdemeanor. His sentence was suspended upon payment of a fine and costs. He appealed his conviction to the superior court. On 6 November 1990, the superior court allowed defendant's motion to withdraw his appeal and ordered the matter remanded to the district court for "immediate execution of its judgment." The record does not disclose the date upon which the case was taken back to the district court for the purpose of defendant's compliance. On 5 November 1990, defendant was convicted in the District Court of Beaufort County for non-felonious breaking or entering, a Class 1 misdemeanor. His sentence was suspended and he was placed on supervised probation. He gave notice of appeal to the superior court. On 8 November 1990, defendant withdrew his notice of appeal. On the same date, he was convicted in the district court for simple assault, a Class 2 misdemeanor.

In determining defendant's prior record points, the trial court treated the non-felonious breaking or entering convictions and the simple assault conviction as having occurred at the same session of district court and assessed one prior record point; the communicating threats conviction was treated separately and the court assessed one prior record point for that conviction. We note that defendant's conviction for simple assault need have not been considered by the trial court because it is a Class 2 misdemeanor for which no prior record points may be assessed for felony sentencing. N.C. Gen. Stat. § 15A-1340.14(b)(5).

Defendant argues that due to the district court schedule at the time, the earliest his conviction for communicating threats could have been taken before the district court after remand was 8 November 1990, the same date upon which he withdrew the appeal of his conviction for non-felonious breaking or entering. Therefore, he

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reasons, both convictions occurred at the same session of the district court on 8 November 1990 and, pursuant to G.S. § 1340.14(d), only one of them may be used in determining his prior record level and should have resulted in only one prior record point. Under his argument, his prior record point total would be four (4), and his prior record level would be reduced to II, permitting the possibility of a sentencing alternative other than an active sentence.

G.S. § 15A-1340.14(d) provides, in pertinent part:

For purposes of determining the prior record level, . . . [i]f an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used.

Defendant's argument requires that we decide when an offender's conviction occurs, for purposes of the application of this statute, when the offender is convicted in the district court, appeals the conviction to the superior court, and subsequently withdraws the appeal pursuant to G.S. § 15A-1431(g) or (h), causing the case to be remanded to the district court for execution of the judgment. We hold that, under such circumstances, the conviction occurs upon the date when the offender was originally convicted in the district court.

"Conviction" is defined in Black's Law Dictionary, Sixth Edition (1990), as "the result of a criminal trial which ends in a judgment or sentence that the accused is guilty as charged." A defendant convicted in the district court may appeal to the superior court for a trial *de novo*, G.S. §§ 7A-290 & 15A-1431(b), which has the effect "as if the case had been brought there originally and there had been no previous trial" in the district court. *State v. Sparrow*, 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970). However, the statutes permit a defendant who has appealed a district court conviction to the superior court to withdraw the appeal, in which event the case is remanded to the district court for execution of the judgment. N.C. Gen. Stat. § 15A-1431(g) and (h). When a defendant withdraws his appeal to the superior court, whether as a matter of right pursuant to G.S. § 15A-1431(g) or with leave of the superior court pursuant to G.S. § 15A-1431(h), and the case is remanded to the district court for execution of the district court judgment, it is as though the appeal had not been taken and the defendant's conviction of the offense occurred upon the date of the entry of judgment in the district court.

In this case, defendant was found guilty of communicating threats on 9 August 1990 in the district court and judgment was entered.

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Upon his withdrawal of his appeal to superior court, the district court judgment became the final judgment in the case; his conviction occurred on 9 August 1990. The same is true of his conviction for non-felonious breaking or entering on 5 November 1990. The convictions did not occur at the same session of district court and, in sentencing defendant in the present case, the trial court properly assessed one prior record point for each of the Class 1 misdemeanor convictions.

Affirmed.

Judges EAGLES and TIMMONS-GOODSON concur.

CLARENCE RAYMOND WILLIAMS, PLAINTIFF V. ANGELA DENISE BOWDEN AND LUANN MICHELLE PASCAL, DEFENDANTS

No. COA97-430

(Filed 6 January 1998)

Insurance § 534 (NCI4th)—underinsured motorist coverage—settlement by insured—oral notice—not sufficient

The trial court properly entered summary judgment for Travelers, plaintiff's underinsured motorist carrier, where plaintiff's attorney had provided only an oral notice of a settlement between plaintiff and defendant. The written notice requirement of N.C.G.S. § 20-279.21(b)(4) is plain and clear.

Appeal by plaintiff from order entered 18 October 1995 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 3 December 1997.

Jackson, Rivenbark & Slaughter, by Bruce H. Jackson, Jr., for plaintiff-appellant.

Johnson & Lambeth, by Maynard M. Brown, for Travelers Indemnity Company, unnamed defendant-appellee.

LEWIS, Judge.

Plaintiff appeals the trial court's entry of summary judgment for defendants. We affirm.

On 21 April 1991, plaintiff was injured when the automobile he was driving collided with a vehicle driven and owned by defendant

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[128 N.C. App. 318 (1998)]

Angela Denise Bowden in Wilmington, North Carolina. Defendant Bowden had automobile liability insurance with New South Insurance Company ("New South") and carried a policy providing \$25,000 per single bodily injury. Plaintiff had underinsured motorist coverage with The Travelers Indemnity Company ("Travelers") with single bodily injury limits of \$100,000.

On 11 June 1992, plaintiff's attorney advised a Travelers claim adjuster that a proposed settlement offer in the sum of \$25,000 had been made by New South. The proposed offer was the maximum single per-person limit under the New South policy. During the telephone conversation, plaintiff's attorney advised the adjuster that he would be making an underinsured motorist claim against Travelers on behalf of plaintiff. On 14 October 1992, plaintiff's attorney had another conversation with the Travelers claims adjuster handling plaintiff's potential underinsured motorist claim. During that conversation, the adjuster indicated that the proposed settlement exceeded his valuation of the claim and that Travelers would not advance any sum to plaintiff.

No written notice of the potential underinsured motorist claim was sent to Travelers prior to plaintiff's acceptance of the proposed offer from New South. In consideration of the sum of \$25,000 paid by New South on behalf of its insured, defendant Bowden, plaintiff gave a "Covenant Not to Enforce Judgment" against defendants on 11 November 1992.

Plaintiff filed a complaint for negligence against defendants on 25 October 1993. Travelers, as the stated underinsured motorist carrier, filed an answer to the complaint. On 23 August 1995, Travelers filed a motion for summary judgment based on the affirmative defenses of failure to provide written notice of settlement as required by statute, and failure to provide written notice as required by the underlying insurance policy. Plaintiff filed a cross-motion for partial summary judgment. Summary judgment was entered in favor of Travelers by Judge W. Allen Cobb, Jr. on 18 October 1995.

Plaintiff filed a notice of appeal of the order, Docket No. COA95-1298, which this Court dismissed as interlocutory on 1 October 1996. On 25 February 1997, a New Hanover County jury returned a verdict in favor of plaintiff and against defendant Bowden in the amount of \$40,000. As a result of the previous payment to plaintiff of the underlying liability policy limit in the sum of \$25,000, a judg-

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ment for plaintiff in the amount of \$15,000 was entered. On 20 March 1997, plaintiff appealed the summary judgment order.

On appeal, plaintiff argues that the trial court erred by granting Travelers' motion for summary judgment. Plaintiff contends that his oral notice of settlement satisfied the written notice requirement under N.C. Gen. Stat. section 20-279.21(b)(4) (1993). We disagree.

General Statute section 20.279.21(b)(4) governs the relationship between plaintiffs, underinsured drivers, and their insurers. It provides:

No insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a police providing coverage against underinsured motorists *where the insurer has been provided with underlying written notice before a settlement between its insured and the underinsured motorist* and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within thirty days following receipt of that notice. Further, the insurer shall have the right, in its election, to pursue its claim by assignment or subrogation in the name of the claimant, and the insurer shall not be nominated as a party in its own name except upon its own election.

G.S. § 20-279.21(b)(4) (emphasis added).

Plaintiff contends that we should look at the intent of the statute and declare that his oral notice satisfies the objective of the written notice requirement. We disagree.

Where the language of a statute is clear and unambiguous, the courts must give it its plain meaning. *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). The written notice requirement of G.S. § 20-279.21(b)(4) is plain and clear. An underinsured motorist carrier may only be said to have waived its rights if, after receiving written notice of a proposed settlement, it fails to advance an amount equal to the proposed settlement within thirty days of the notice. Travelers did not receive the statutorily required written notice; therefore, it did not waive its rights. The trial court's order is

Affirmed.

Judges WALKER and TIMMONS-GOODSON concur.

TOWN OF PINE KNOLL SHORES v. CAROLINA WATER SERVICE

[128 N.C. App. 321 (1998)]

TOWN OF PINE KNOLL SHORES, ROBERT F. GALLO, DAVID E. HASULAK, MARY I. KANYHA C. REESE MUSGRAVE, EVAN C. RODERICK, AND RICHARD H. SCHULTZ, APPELLEES v. CAROLINA WATER SERVICE, INC. OF NORTH CAROLINA, APPELLANT

No. COA97-138

(Filed 6 January 1998)

Declaratory Judgment Actions § 7 (NCI4th)—town water system—proposed construction—actual controversy required

The trial court lacked jurisdiction under the Declaratory Judgment Act to enter a judgment in an action to determine whether an agreement giving defendant the exclusive right to provide water to certain land was enforceable because the alleged controversy between the parties was based solely on the Town's proposed construction of a water system. An actual controversy between the parties is a jurisdictional requirement.

Appeal by defendant Carolina Water Service, Inc. of North Carolina, from judgment entered 31 October 1996 by Judge James E. Ragan, III, in Carteret County Superior Court. Heard in the Court of Appeals 7 October 1997.

Hunton & Williams, by Edward S. Finley, Jr., and Smith, Helms, Mulliss & Moore, by James G. Exum, Jr., for defendant-appellant.

Kirkman & Whitford, by Kenneth M. Kirkman, for plaintiffs-appellees.

Carolinas Chapter of the National Association of Water Companies (Amicus Curiae), by William E. Grantmyre.

WYNN, Judge.

An actual controversy between the parties must exist at the time the complaint is filed in order for the court to have jurisdiction to render a declaratory judgment. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 584-85, 347 S.E.2d 25, 29 (1986). Because there is no actual controversy involved in this case, we vacate the judgment of the trial court.

On 20 September 1995, the Town of Pine Knoll Shores and six individuals who owned property within the town brought an action

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[128 N.C. App. 321 (1998)]

for declaratory judgment against Carolina Water Service, Inc. of North Carolina (“Carolina Water”). The plaintiffs sought a declaration that a 1966 agreement that entitled Carolina Water to the exclusive right to provide water to their land was no longer enforceable. After a trial on stipulated facts, the trial court entered a judgment declaring that the 1966 agreement “is no longer enforceable by Defendant [Carolina Water] or its successors in interest and is not binding upon Plaintiffs.” Carolina Water appeals from this judgment, arguing that the trial court erred by finding the agreement unenforceable. We do not, however, consider the parties’ arguments because we hold that the trial court did not have jurisdiction to render a declaratory judgment.

Pine Knoll Shores brought this action under North Carolina’s version of the Uniform Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 to 1-267 (1996). N.C. Gen. Stat. § 1-253 provides that North Carolina courts “shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.” N.C. Gen. Stat. § 1-254 provides:

Any person interested under a deed, will, written contract or other writings constituting a contract, . . . may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

“Although the North Carolina Declaratory Judgment Act does not state specifically that an actual controversy between the parties is a jurisdictional prerequisite to an action thereunder, our case law does impose such a requirement.” *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986).

In *Wendell v. Long*, 107 N.C. App. 80, 81, 418 S.E.2d 825, 825 (1992), the plaintiffs were property owners in a residential subdivision. They brought an action under the Declaratory Judgment Act asking for a declaration that restrictive covenants in the deeds of their neighbors were valid and would prohibit the defendants’ proposed construction project. *Id.* at 81-82, 418 S.E.2d at 825. We held that there was no actual controversy between the parties that would satisfy the jurisdictional requirement, because the plaintiffs’ complaint did not “allege that defendants have acted in violation of these covenants, but [rather] that they anticipate some future action to be

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[128 N.C. App. 323 (1998)]

taken by defendants which would result in a violation." *Id.* at 83, 418 S.E.2d at 826. The case was vacated and remanded for an order dismissing the action because of the lack of jurisdiction. *Id.*

In the present case, Pine Knoll Shores alleged in its complaint that "[t]he Town is the owner of certain real property located within the corporate boundaries of Pine Knoll Shores upon which it *proposes* to construct a water system for purposes of providing potable water to the residents of the Town of Pine Knoll Shores." (emphasis added). Thus, as of the filing of the complaint in this case, the alleged controversy between the parties was based solely on proposed action. Since our courts do not render advisory opinions, and in light of *Wendell*, we must vacate the judgment of the trial court and remand this matter for entry of an order dismissing the action.

Vacated and remanded.

Judges WALKER and SMITH concur.

JERRY ALLEN HOLCOMB, EMPLOYEE, PLAINTIFF v. PEPSI COLA CO., EMPLOYER, DEFENDANT; AND LUMBERMENS MUTUAL CASUALTY, CARRIER, DEFENDANT

No. COA97-257

(Filed 6 January 1998)

Workers' Compensation § 415 (NCI4th)—credibility—findings of deputy commissioner rejected by Commission—Commission's findings inadequate

The Industrial Commission erred by reversing a deputy commissioner's ruling on credibility on a cold record without first acknowledging that the deputy commissioner was in a better position to judge the credibility of the witness and without making findings revealing the basis for rejecting the deputy commissioner's findings of credibility.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 18 December 1996. Heard in the Court of Appeals 17 November 1997.

Smith and Welborn, by Franklin Smith, for plaintiff appellant.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by L. Kristin King, for defendant appellee.

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[128 N.C. App. 323 (1998)]

GREENE, Judge.

Jerry Allen Holcomb (plaintiff) appeals from an Opinion and Award of the North Carolina Industrial Commission (Commission) denying him workers' compensation benefits.

The facts are as follows: On 20 April 1994, the plaintiff suffered a neck strain and shoulder injury as he was carrying five or six cases of canned drinks on a hand truck up a set of stairs. Pepsi Cola Company (defendant) accepted the injuries as compensable under workers' compensation. The plaintiff received medical treatment for his shoulder and neck problems and twenty-six weeks of short term disability pay from August 1994 until mid-February 1995. Dr. James W. Serene (Dr. Serene), a board certified orthopedic surgeon, treated the plaintiff for his injuries and allowed him to return to light duty work on 30 May 1994, and to his regular job with no restrictions on 6 June 1994. On 27 June 1994, the plaintiff returned to Dr. Serene and complained of having aggravated his upper back pain. Dr. Serene again placed the plaintiff on light duty work through 26 July 1994, after which the plaintiff could return to his regular job with no restrictions. The plaintiff's employment was terminated on 6 March 1995. On 13 April 1995, the plaintiff was again treated by Dr. Serene at the request of the defendant. In Dr. Serene's opinion, the plaintiff was at maximum medical improvement and did not have any permanent partial disability.

The plaintiff was also treated by Dr. Jerry Ziglar (Dr. Ziglar), a family medicine doctor, board certified in internal medicine, who released the plaintiff to remain out of work. Dr. Ziglar referred the plaintiff to Dr. Harlan Daubert (Dr. Daubert), a board certified orthopedic surgeon, who examined the plaintiff in October of 1994. In his deposition, Dr. Daubert stated his opinion that the "neck pain began with a direct temporal relationship to a [sic] accident which occurred at work on April 20th of 1994."

The claim was heard by Deputy Commissioner Douglas E. Berger (Deputy Commissioner) on 17 July 1995. The plaintiff and his former supervisor, Jeff McMahon, testified before the Deputy Commissioner. The Deputy Commissioner found as a fact that the "[p]laintiff is a credible and convincing witness as to his account of events [and] [p]laintiff is a credible and convincing witness as to his description of pain to his neck as well as his inability to do heavy lifting as a result of that pain." The Deputy Commissioner awarded the plaintiff temporary total disability compensation and temporary partial disability compensation.

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[128 N.C. App. 323 (1998)]

The defendant appealed to the Commission which, based upon the evidence in the record and without witnessing the testimony of the plaintiff, reversed the award of the Deputy Commissioner. The majority of the Commission found that the plaintiff was not "a credible and convincing witness as to his description of pain in his neck and his inability to work as the result of that pain."

The dispositive issue is whether the Commission may reverse the Deputy Commissioner's ruling on credibility by simply finding as a fact that it did not find the evidence credible.

The Commission is not required to receive new evidence and may simply decide the case on the record before the Deputy Commissioner. N.C.G.S. § 97-85 (1991). When deciding the case on the record, however, the Commission is required to consider that the Deputy Commissioner is in a better position to judge the credibility of the witnesses. *Sanders v. Broghill Furniture Industries*, 124 N.C. App. 637, 639-40, 478 S.E.2d 223, 225 (1996), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208-09 (1997); *Taylor v. Caldwell Systems, Inc.*, 127 N.C. App. 542, 545, 491 S.E.2d 686, 689 (1997). Findings should be entered reflecting that the Commission made this consideration. *Cf. Foy v. Hunter*, 106 N.C. App. 614, 620, 418 S.E.2d 299, 303 (1992) (prior to dismissing action under Rule 8 of the North Carolina Rules of Civil Procedure, the trial court is required to make findings that indicate it has considered less drastic sanctions). Furthermore, when the Commission rejects a credibility determination made by the Deputy Commissioner, it must enter findings "showing why the [D]eputy [C]ommissioner's credibility determination should be rejected." *Sanders*, 124 N.C. App. at 641, 478 S.E.2d at 226.

In this case, the Deputy Commissioner found the plaintiff to be a credible witness after observing and listening to him in the hearing. The Commission, reviewing only the cold record, found that the plaintiff was not a credible and convincing witness. The Commission made no findings revealing that it rejected the Deputy Commissioner's determination of credibility only after first acknowledging that the Deputy Commissioner was in a better position to judge the credibility of the witness. Furthermore, the Commission made no findings revealing the basis for rejecting the Deputy Commissioner's findings of credibility.

Accordingly, the Opinion and Award of the Commission is reversed and remanded to the Commission for the entry of a new

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[128 N.C. App. 326 (1998)]

Opinion and Award. The Commission must give due consideration to the credibility determination made by the Deputy Commissioner and enter findings of fact as required by this opinion.

Reversed and remanded.

Chief Judge ARNOLD and Judge McGEE concur.

SHEILA BANNER HANEY (GOLDEN), PLAINTIFF V. ANTHONY TAIT MILLER, INTEGON INSURANCE COMPANY AND ALLSTATE INSURANCE COMPANY, DEFENDANTS

No. COA97-89

(Filed 6 January 1998)

Insurance § 1167 (NCI4th)— named insured—driving father’s Porsche—expressly forbidden—not covered

The trial court erred in a negligence action arising from an automobile collision by granting summary judgment for plaintiff and declaring that the insurance policy issued by Integon to defendant provided liability coverage where the policy excluded coverage for any person who used a vehicle without a reasonable belief that that person was entitled to do so and defendant had been specifically told never to drive the Porsche involved in the accident. The words “any person” are not ambiguous, have no other defined meaning within the policy and must be given their plain meaning. The Integon policy does not provide liability coverage to defendant’s operation of his father’s Porsche even though he was the named insured.

Appeal by defendant Integon Insurance Company from order dated 7 August 1995 by Judge James U. Downs in Avery County Superior Court. Heard in the Court of Appeals 17 November 1997.

No brief for plaintiff appellee.

Willardson Lipscomb & Beal, L.L.P., by William F. Lipscomb, for defendant appellant Integon Insurance Company.

GREENE, Judge.

Integon Insurance Company (Integon) appeals from an order of the trial court granting Sheila Banner Haney’s (Golden) (plaintiff) motion for summary judgment.

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The facts are as follows: In May of 1993 Anthony T. Miller (defendant) was the named insured in an automobile insurance policy issued by Integon that covered his 1985 Honda automobile. On 1 May 1993, the defendant, while driving a 1983 Porsche automobile (Porsche) owned by his father, Dr. John Joseph Miller, Jr. (Dr. Miller) was involved in an automobile accident with the plaintiff. The defendant testified at a deposition that he did not have permission to drive the Porsche and had been specifically instructed by Dr. Miller never to drive the Porsche. The plaintiff filed a declaratory judgment action on 15 February 1995 seeking to establish that the defendant's automobile insurance policy issued by Integon provided liability coverage for his use of Dr. Miller's Porsche. The automobile insurance policy issued to the defendant excluded liability coverage for "any person" who used "a vehicle without a reasonable belief that that person is entitled to do so." Entering an order on 7 August 1995, the trial court allowed the plaintiff's motion for summary judgment and declared that the defendant's automobile insurance policy issued by Integon did provide liability coverage for the defendant's use of Dr. Miller's Porsche. Integon filed a notice of appeal from this order on 1 September 1995 and this Court dismissed the appeal, pursuant to an opinion filed 5 November 1996, because the plaintiff's negligence action against the defendant and Dr. Miller had not been resolved and the amount of the plaintiff's damages was undetermined. On 16 December 1996 a consent judgment entered in the negligence action established that the plaintiff was injured and her property was damaged because of the defendant's negligence and that she was entitled to \$10,000.00 from the defendant.

The dispositive issue is whether an automobile insurance policy exclusion, which excludes liability coverage for any person who uses an automobile without a reasonable belief that he has a right to use it, applies to the named insured.

Insurance policies are contracts and the provisions of the policies govern the rights and duties of the parties. *Deason v. J. King Harrison Co.*, 127 N.C. App. 514, —, 491 S.E.2d 666, 668 (1997). Exclusions from coverage must be strictly construed. *Id.* In this case, the insurance policy in question provides that liability coverage is not extended to "any person . . . [u]sing a vehicle without a reasonable belief that that person is entitled to do so." The words "any person" are not ambiguous and have no other defined meaning within the policy itself and therefore must be given their plain meaning. Our

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Supreme Court construing similar policy language held that the words "any person" "encompasses *any* person, whether that person is the named insured, a family member or a third party, unless express exceptions in the policy . . . provide otherwise." *Newell v. Nationwide Mut. Ins. Co.*, 334 N.C. 391, 401, 432 S.E.2d 284, 290 (1993).

In this case there is no dispute that the defendant did not have a reasonable belief that he was entitled to use the Porsche. In fact, he had been specifically instructed never to drive the Porsche. As a result, the Integon policy does not provide liability coverage to the defendant's operation of his father's Porsche, even though he was the named insured in that policy.

Accordingly, the summary judgment entered for the plaintiff is reversed and this case is remanded to the superior court for entry of summary judgment for Integon.

Reversed and remanded.

Chief Judge ARNOLD and Judge McGEE concur.

STATE OF NORTH CAROLINA v. STACY ANDREW JUDD

No. COA97-213

(Filed 6 January 1998)

Appeal and Error § 81 (NCI4th)— motion to suppress cocaine allowed—appeal by State—no certification by prosecutor—dismissed

An appeal by the State from the granting of a motion to suppress fifty-two grams of crack cocaine in a prosecution for cocaine possession and trafficking was dismissed where there was no indication in the record that the prosecutor certified to the trial court that the appeal was not taken to cause delay and that the suppressed evidence was essential to the State's case. N.C.G.S. § 15A-979(c).

Appeal by the State from order filed 2 December 1996 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 17 November 1997.

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Attorney General Michael F. Easley, by Assistant Attorney General John G. Barnwell, for the State.

R. Allen Lytch, P.A., by R. Allen Lytch and Sheila Stafford Pope, for the defendant appellee.

GREENE, Judge.

The State appeals from the trial court's order allowing Stacy Andrew Judd's (defendant) motion to suppress evidence of fifty-two grams of crack cocaine seized from him.

On 14 October 1996, the defendant was indicted for conspiracy to traffic in cocaine by possession and transportation and for trafficking cocaine by possession and transportation. The defendant made a motion to suppress the evidence seized, fifty-two grams of crack cocaine, and contended it was obtained in violation of his rights under the United States Constitution and the North Carolina Constitution. The trial court granted the motion to suppress and the State appealed.

The dispositive issue is whether this Court has jurisdiction over the State's appeal.

"The State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979." N.C.G.S. § 15A-1445(b) (Supp. 1996). Subsection (c) of N.C. Gen. Stat. § 15A-979 provides that a superior court order that grants a motion to suppress is appealable "prior to trial upon certificate by the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case." N.C.G.S. § 15A-979(c) (1988). The burden is on the State to show that it has the right to appeal and has appealed in accordance with the requirements of the statute. *State v. Dobson*, 51 N.C. App. 445, 447, 276 S.E.2d 480, 482 (1981).

In this case, there is no indication in the record that the prosecutor certified to the trial court, which granted the motion to suppress, that the appeal was not taken to cause delay and that the suppressed evidence was essential to the State's case. Because the State did not follow the mandate of section 15A-979(c), this Court is without jurisdiction over the appeal. *State v. McDonald*, 55 N.C. App. 393, 394, 285 S.E.2d 282, 283 (1982).

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Dismissed.

Chief Judge ARNOLD and Judge McGEE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS
FILED 6 JANUARY 1998

BENFIELD v. KIMBERLY-CLARK CORP. No. 97-710	Ind. Comm. (814088)	Dismissed
BUNDY v. AMBROSE No. 97-734	Pasquotank (93CVD647)	Dismissed
CITY OF RALEIGH v. RALEIGH BD. OF ADJUSTMENT No. 97-160	Wake (95CVS8005) (95CVS7813)	Dismissed in part; Affirmed in part
COLVILLE v. AMERICAN FED'N OF GOVT EMPLOYEES No. 97-269	Cumberland (95CVS5626)	Appeal Dismissed
DARLING v. WEEKS No. 97-338	Pasquotank (95CVS9)	Affirmed
FISHER v. STATE FARM INS. CO. No. 97-508	Mecklenburg (95CVS8022)	Vacated
HASHEMI v. WINN DIXIE STORE, INC. No. 97-170	Ind. Comm. (271420)	Affirmed
IN RE EFIRD No. 97-633	Buncombe (96J152)	Affirmed
IN RE POLLOCK SWAMP DRAINAGE DIST. No. 97-729	Chowan (96SP18)	Affirmed
IN RE SWINSON No. 97-765	Wilson (96J128)	Affirmed
INGRAM v. INGRAM No. 97-530	Guilford (91CVD9677)	Affirmed
KIRBY v. INDUSTRIAL CONTRACTORS, INC. No. 97-410	Wake (95CVD2706)	Affirmed
L. D. AUSTIN CO. v. TOWN OF MAIDEN No. 97-123	Catawba (95CVS890)	Affirmed
MACE v. MACE No. 97-413	Buncombe (96CVS05104)	Affirmed
NEALLY v. CAMPBELL SOUP CO. No. 97-345	Harnett (93CVS00565)	No Error

OWEN v. BOLEY No. 97-670	Transylvania (95CVS50)	Dismissed
PARHAM v. N.C. DEPT. OF HUMAN RES. No.97-178	Ind. Comm. (TA-12728)	Dismissed and remanded with instructions
RINALDI v. NORFOLK SOUTHERN RAILWAY CO. No. 97-242	Mecklenburg (95CVS5067)	No Error
SHEARIN v. TOWN OF COATS No. 96-1470	Harnett (96CVS00882)	Affirmed
STATE v. BUSTION No. 97-836	Halifax (91CRS5748)	Affirmed
STATE v. COVERT No. 97-663	Onslow (94CRS5864) (94CRS5866) (94CRS5868) (94CRS5939)	Affirmed
STATE v. EDWARDS No. 96-1500	New Hanover (94CRS26861)	No Error
STATE v. FISHER No. 97-671	Mecklenburg (95CRS95647)	No Error
STATE v. HARGROVE No. 97-728	Wake (95CRS95862) (95CRS95863) (95CRS95864)	No Error
STATE v. HARRELL No. 97-594	Hertford (94CRS2124) (94CRS2186) (94CRS2187) (94CRS2211)	Affirmed
STATE v. JONES No. 97-716	Pasquotank (96CRS731) (96CRS4483)	No Error
STATE v. PARKER No. 97-479	Edgecombe (95CRS12584)	No Error
STATE v. RAGAGLIA No. 97-827	Beaufort (96CRS2053)	No Error
STATE v. SCOTT No. 97-543	Randolph (93CRS10294) (93CRS10295)	No Error
STATE v. SIMMONS No. 97-301	Duplin (96CRS512)	No Error

STATE v. WASHINGTON No. 97-447	Mecklenburg (95CRS61110)	No Error
STATE v. WEAVER No. 97-639	Rutherford (94CRS7970) (94CRS8478)	No Error
STATE v. WOOTEN No. 97-66	Davidson (95CRS1465) (95CRS7079) (95CRS9053)	Case 95CRS1465— No Error. Case 95CRS7079— New Trial. Case 95CRS9053— New Trial.
STATE ex rel. BRAY v. MARSHALL No. 97-177	Pasquotank (96CVD66)	Affirmed in part, Reversed in part, and Remanded
WYATT v. WYATT No. 96-1246	Buncombe (93CVD1246)	Affirmed in part, Reversed in part

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PRESTON GENE HOUPE, PLAINTIFF V. CITY OF STATESVILLE, A MUNICIPAL CORPORATION; JACK KING, IN HIS OFFICIAL CAPACITY AS CITY MANAGER; ROBERT WARSHAW, INDIVIDUALLY AND IN HIS FORMER OFFICIAL CAPACITY AS CHIEF OF POLICE; DALTON Z. BROWN, IN HIS OFFICIAL CAPACITY AS ASSISTANT CHIEF OF POLICE AND FORMERLY ACTING CHIEF OF POLICE; EDWARD JARVIS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS LIEUTENANT AND FORMERLY AS ACTING ASSISTANT CHIEF OF POLICE; GREGORY STONE, IN HIS OFFICIAL CAPACITY AS AN INTERNAL AFFAIRS INVESTIGATOR, AND MICHAEL GRANT, IN HIS OFFICIAL CAPACITY AS A CRIMINAL INVESTIGATOR, DEFENDANTS

No. COA96-1272

(Filed 20 January 1998)

1. Municipal Corporations § 413 (NCI4th)— police officers—investigation and discipline—governmental function

The actions of the City and its officials in investigating and disciplining a police officer who was accused of criminal activity were within the rubric of “governmental functions” for governmental immunity.

2. Municipal Corporations § 445 (NCI4th)— police officer—wrongful termination—waiver of immunity—insurance exclusionary clause

In an action by a police officer for wrongful termination, the trial court did not err in denying defendants’ motion for judgment on the pleadings where one of the City’s two insurance clauses excluded emotional distress and mental anguish and plaintiff admitted in interrogatories that he sought recovery on those bases. Consideration of interrogatories is not proper in a motion for judgment on the pleadings and the record does not reflect the trial court’s consideration of interrogatories; moreover, in view of the requirement that insurance exclusions be strictly construed, it cannot be concluded that defendants clearly demonstrated that governmental immunity was not waived by purchase of that policy.

3. State § 27 (NCI4th)— dismissal of police officer—breach of contract—sovereign immunity—not applicable

The trial court did not err in denying defendants’ motion for judgment on the pleadings as to a breach of contract claim where the complaint alleged that the City’s charter, ordinances and written policies created an agreement whereby plaintiff would not be terminated except for “good cause.” Sovereign immunity is not applicable to breach of contract claims and plaintiff met this

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requirement by alleging that the City's charter, ordinances and written polices created an agreement; whether the charter, ordinances and written policies became a part of the contract is not an issue properly adjudicated on the pleadings.

4. Municipal Corporations § 453 (NCI4th)— police officer—dismissal—employment contract—judgment on the pleadings

The trial court erred in an action arising from the dismissal of a police officer by denying defendants' motion for judgment on the pleadings as to breach of contract claims with respect to the individual defendants where plaintiff alleged that the City and not the individuals had hired him.

5. Municipal Corporations § 445 (NCI4th)— dismissal of police officer—libel and slander action—not covered by insurance—immunity not waived

Governmental immunity was not waived by the City's purchase of two insurance policies and the trial court erred by denying defendants' motion for judgment on the pleadings as to claims for libel and slander *per se* against defendant Jarvis in his official capacity arising from the dismissal of a police officer where Jarvis, in his role as a supervisor, prepared and disseminated a memo which contained defamatory statements. One policy excludes claims for libel and slander and the other excludes coverage for employment-related defamation.

6. Libel and Slander § 26 (NCI4th)— slander—grand jury testimony—privileged

The trial court erred in an action arising from the dismissal of a police officer by denying defendants' motion for judgment on the pleadings regarding plaintiff police officer's slander claim against defendant police officer Grant arising from Grant's grand jury testimony. Defamatory statements made by a witness in a judicial proceeding fall within the absolute privilege rule.

7. Municipal Corporations § 445 (NCI4th)— dismissed police officer—malicious prosecution and false arrest claims—governmental immunity—insurance exclusion—employment claims

The trial court properly denied defendants' motion for judgment on the pleadings as to plaintiff police officer's malicious prosecution and false arrest claims where the claims against the

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City and its police officers were not precluded by governmental immunity since one of the City's insurance policies excludes claims arising out of and in the course of employment but plaintiff's complaint alleged that the events constituting his injuries happened when he was no longer employed by the City.

8. Municipal Corporations § 445 (NCI4th)— dismissal of police officer—immunity—insurance exclusion—operational law enforcement

The trial court did not err by denying defendants' motion for judgment on the pleadings on a claim for negligent supervision and negligent retention against the City and several of its police officers where governmental immunity was not waived. One of defendant's insurance policies excluded causes of action arising out of "operational law enforcement function" but did not provide a definition for the terminology. Exclusionary clauses are strictly construed to provide coverage and defendants did not show that they are entitled to judgment as a matter of law.

9. Constitutional Law § 85 (NCI4th)— dismissal of police officer—§ 1983 claim—custom or policy of city not alleged

The trial court erred in denying defendants' motion for judgment on the pleadings as to a 42 U.S.C. § 1983 claim arising from the dismissal of a police officer where plaintiff failed to allege that he was harmed pursuant to a custom or policy of the defendant City.

10. Municipal Corporations § 360 (NCI4th)— dismissal of police officer—violation of N.C.G.S. § 160A-168—not a civil action

The trial court erred in an action arising from the dismissal of a police officer by denying defendants' motion for judgment on the pleadings as to plaintiff's claim that two of the defendants violated N.C.G.S. § 160A-168 by publishing information from an Internal Affairs investigation to other officers. That statute does not create a civil cause of action.

11. Labor and Employment § 90 (NCI4th)— dismissed police officer—N.C.G.S. § 14-355—punitive damages claim against City—judgment on the pleadings

The trial court erred by denying defendants' motion for judgment on the pleadings in an action alleging that a police chief intentionally interfered with plaintiff's employment opportunities

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by written and oral publication of false and erroneous information in violation of N.C.G.S. § 14-355. The statute clearly authorizes a cause of action for "penal," or punitive damages, a cause of action against an officer in his official capacity is essentially a claim against the City, and punitive damages may not be recovered against a municipality absent statutory authorization.

12. Municipal Corporations § 413 (NCI4th)— dismissal of police officer—conspiracy—municipal corporation—not a party

The trial court erred in an action arising from a police officer's dismissal by denying defendants' motion for judgment on the pleadings as to plaintiff's claim that defendants as employees conspired to deprive him of his employment, to deprive him of a Board hearing and to bring criminal charges against him. A cause of action against an officer in his official capacity is essentially a claim against the City, the general rule is that an municipal corporation cannot in its sovereign or municipal capacity be a party to a conspiracy, and plaintiff's complaint did not contain an allegation that the asserted conspiracy fell outside this general rule.

Appeal by defendants from order filed 6 September 1996 by Judge Zoro J. Guice, Jr., in Iredell County Superior Court. Heard in the Court of Appeals 21 May 1997.

Eisele & Ashburn, P.A., by John D. Greene, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and Jack M. Strauch, for defendants-appellants.

JOHN, Judge.

Defendant City of Statesville (the City) and co-defendants City Manager Jack King (City Manager King), Statesville police officers former Chief Robert Warshaw (Chief Warshaw), Assistant Chief of Police Dalton Z. Brown (Brown), Investigations Lieutenant Edward Jarvis (Jarvis), Internal Affairs Investigator Gregory Stone (Stone), and criminal investigator Michael Grant (Grant) appeal an order of the trial court denying their motion for judgment on the pleadings. We affirm that order in part and reverse in part.

On 21 June 1995, plaintiff, a Statesville police officer, filed suit against defendants alleging eleven causes of action, including, *inter*

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alia, wrongful termination, breach of contract, libel, slander, malicious prosecution, false arrest, and violation of civil rights. Chief Warshaw and Jarvis were sued both individually and in their official capacities, while City Manager King, Brown, Stone and Grant were sued solely in their official capacities.

Pertinent factual information as alleged in plaintiff's complaint included the following: Sometime prior to December 1993, plaintiff complained "to third persons employed with the City's Police Department" (the Department) that a "double standard" existed between the disciplinary treatment of high-ranking officers, including Jarvis, and low-ranking officers, with the former being given preference. Chief Warshaw responded by threatening to terminate plaintiff's employment if he made further accusations regarding the alleged impunity of Jarvis and others in the Department.

In January 1994, Jarvis reported to Chief Warshaw that plaintiff had been engaged in "certain off duty/patrol assistance activities" on 27 December 1993 which, according to Jarvis, may have included criminal activity. Chief Warshaw assigned Jarvis to conduct an internal investigation into plaintiff's 27 December 1993 activities, notwithstanding the Chief's knowledge that Jarvis harbored personal prejudice against plaintiff. Stone was assigned to assist Jarvis.

According to plaintiff's complaint, Jarvis and Stone improperly conducted their investigation into plaintiff's conduct, failing to interview witnesses or develop physical evidence in a thorough manner. The pair also directed plaintiff to submit to a recorded and videotaped interrogation without the presence of legal counsel, during which inquiry Jarvis misrepresented evidence and statements of witnesses. Although Jarvis subsequently concluded there existed no probable cause to suspect criminal activity on the part of plaintiff, Jarvis wrote and published to Chief Warshaw and others a report that plaintiff had attempted to break into one business and had actually broken into another during the early morning hours of 27 December 1993.

On 28 January 1994, Chief Warshaw terminated plaintiff's employment in retaliation for plaintiff's complaints about double standards within the Department. Although the City's charter, ordinances and policies specified that non-probationary Department employees possessed the right to appeal termination to the City's Civil Service Board (the Board), plaintiff was afforded no opportunity

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to pursue such an appeal. The City, by and through the Board, City Manager King, Chief Warshaw and Jarvis, conspired to deny plaintiff's right to a hearing by asserting he was merely a probationary employee. Notwithstanding the City's denial of a hearing, plaintiff tendered, under the City's charter and Board policy, timely written notice of appeal of his termination. Immediately upon receipt thereof, Chief Warshaw, in an attempt to intimidate plaintiff into abandoning his appeal, assigned Grant to conduct a criminal investigation concerning plaintiff's 27 December 1993 activities. On 23 February 1994, Grant reported the findings of his inquiry to Chief Warshaw and Jarvis. No criminal charges were brought against plaintiff at that time.

Seeking to establish his status as a non-probationary employee, plaintiff filed a declaratory judgment action 18 February 1994 in Iredell County Superior Court. On 11 July 1994, approximately one month prior to the scheduled trial date for that case, Jarvis (then Acting Assistant Chief of Police) instructed Grant to testify before the Iredell County grand jury regarding his investigation of the events of 27 December 1993. Following Grant's testimony, the grand jury issued two indictments against plaintiff, and the latter was subsequently arrested 13 July 1994 and subjected to significant negative publicity in the local media.

Thereafter, on 26 August 1994, a jury in plaintiff's declaratory judgment action returned a verdict in plaintiff's favor, determining he indeed qualified as a non-probationary employee. The Board consequently conducted a hearing 28 November to 8 December 1994, following which the panel determined plaintiff was unjustifiably terminated and reinstated him as a police officer with the City. Early in 1995, the local District Attorney dismissed the criminal charges pending against plaintiff, citing the Board's findings.

As noted above, plaintiff initiated the instant action 21 June 1995. Defendants filed answer denying the essential allegations of the complaint and asserting, *inter alia*, the defense of governmental immunity. Defendants thereafter filed an amended answer, and the City and the co-defendants sued in their official capacities (hereinafter collectively "defendants," excluding Chief Warshaw and Jarvis individually) subsequently moved for judgment on the pleadings (defendants' motion) 8 March 1996. Defendants' motion was denied in an order filed 6 September 1996, and defendants timely appealed to this Court.

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A party moving for judgment on the pleadings admits:

(1) the truth of all well-pleaded facts in the non-movant's pleading, together with all permissible inferences to be drawn from such facts; and (2) the untruth of his own allegations in so far as they are controverted by the non-movant's pleading.

Hedrick v. Rains, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283, *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996). Judgment on the pleadings is not favored in the law because it is both summary and final. *Id.* The movant is held to a strict standard to show that no material issue of fact exists and that he or she is clearly entitled to judgment. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). While advancing a multiplicity of arguments, defendants in the main contend the trial court properly determined there was no material issue of fact regarding plaintiff's claims because his complaint revealed each was barred under the doctrine of governmental immunity.

Although defendants' appeal of the trial court's order denying defendants' motion is interlocutory,

we have held that orders denying dispositive motions grounded on the defense of governmental immunity are immediately reviewable as affecting a substantial right.

Hedrick, 121 N.C. App. at 468, 466 S.E.2d at 283; *see also Whitaker v. Clark*, 109 N.C. App. 379, 381, 427 S.E.2d 142, 143, *disc. review and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). We therefore entertain defendants' appeal to the extent it is based upon the defense of governmental immunity. Moreover, where it would be in the interests of judicial economy to do so, *see Liggett Group v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 678 (1993) (this Court may entertain an interlocutory appeal when doing so "would expedite the administration of justice"), we will in our discretion address defendants' alternative arguments.

[1] Governmental immunity shields municipalities and the officers or employees thereof sued in their official capacities from suits based on torts committed while performing a governmental function. *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). This Court has previously held that the provision of police services, *Coleman v. Cooper*, 89 N.C. App. 188, 192, 366 S.E.2d 2, 5, *disc. review denied*, 322 N.C.

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834, 371 S.E.2d 275 (1988), and the training and supervision of police officers, *Lyles v. City of Charlotte*, 120 N.C. App. 96, 100, 461 S.E.2d 347, 350 (1995), *rev'd on other grounds*, 344 N.C. 676, 477 S.E.2d 150 (1996), constituted governmental functions. We believe the actions of a city and its officials in investigating and disciplining a city police officer accused of criminal activity are likewise encompassed within the rubric of "governmental functions."

A municipality may waive governmental immunity for tort actions by the purchase of liability insurance. N.C.G.S. § 160A-485(a) (1994). However, the purchase of such insurance must be alleged in order for a complaint to set forth a claim against a governmental entity or its officers or employees in their official capacities. *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 504, 451 S.E.2d 650, 657-58, *appeal dismissed and disc. review denied*, 339 N.C. 739, 454 S.E.2d 654 (1995). Notwithstanding presence of the requisite allegation in the instant complaint, defendants contend plaintiff's tort claims are excluded from coverage by the alleged policies of insurance (defendants' policies) underwritten by General Star National Insurance Company (General Star policy) and National Casualty Company (National Casualty policy). See *Dickens v. Thorne*, 110 N.C. App. 39, 44, 429 S.E.2d 176, 179 (1993) (governmental immunity retained for causes of action excluded by insurance policy). These policies were attached to defendants' answer and incorporated therein. See *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 558 (1984) (attached exhibits become part of the pleadings).

We emphasize defendants' motion was directed at plaintiff's claims against City Manager King, Chief Warshaw, Brown, Jarvis, Stone and Grant, in their *official* capacities. It is well-settled that

an action . . . brought against individual officers in their official capacities . . . is one against the state for the purposes of applying the doctrine of sovereign immunity.

Dickens, 110 N.C. App. at 45, 429 S.E.2d at 180 (citations omitted). Thus, while we discuss the propriety of defendants' motion as to the City and the individual defendants in their official capacities, we do not consider plaintiff's claims against Chief Warshaw and Jarvis in their individual capacities.

We address each of plaintiff's eleven claims in turn.

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I. Wrongful Termination

[2] Plaintiff first alleged the City by and through Chief Warshaw terminated plaintiff in consequence of his statements asserting a “double standard” of discipline within the Department. Plaintiff further alleged the City, City Manager King and Chief Warshaw knew or should have known that plaintiff’s termination and denial of hearing before the Board “would be . . . violation[s] of the public policy of this state.” We affirm the trial court’s denial of defendants’ motion as to this claim.

We first consider defendants’ policies. The General Star policy excludes “[p]ersonal injury arising out of any . . . [t]ermination of employment.” The tort of wrongful discharge is thus unambiguously excluded by this policy, and governmental immunity as to that tort was not waived thereunder.

Applicability of the National Casualty policy, however, is less easily resolved. The meaning of specific language used in a policy of insurance is a question of law. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). When language is clear and unambiguous, as in the General Star policy exclusion, a policy provision will be accorded its plain meaning. *Walsh v. Insurance Co.*, 265 N.C. 634, 639, 144 S.E.2d 817, 820 (1965). However, when language is subject to more than one interpretation, a policy provision is to be liberally construed so as to afford coverage whenever possible by reasonable construction. *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986). Further, it is well settled in this jurisdiction that exclusionary provisions are not favored in the law and will be construed against the insurer if ambiguous. *Id.*

Defendants rely on the following section of the National Casualty policy which excludes any claim made against the insured

[f]or any damage arising from bodily injury, sickness, emotional distress, mental anguish, disease or death of any person, or for damage to or destruction of any property, including diminution of value or loss of use thereof.

Defendants argue that an interrogatory response of plaintiff indicated he sought recovery for emotional distress and mental anguish, and that plaintiff’s wrongful termination claim is thus excluded under the National Casualty policy. However, consideration of interrogatories by the trial court is not proper in ruling on a motion for judgment on

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the pleadings, *see Minor*, 70 N.C. App. at 78, 318 S.E.2d at 867, and the record in any event does not reflect the trial court's consideration thereof in ruling on defendants' motion. We are therefore unpersuaded by this argument.

In addition, defendants have failed otherwise to show how the foregoing provision would operate to preclude plaintiff's claim for wrongful termination. In view of the requirements that insurance exclusions be strictly construed, *State Capital*, 318 N.C. at 538, 350 S.E.2d at 68, and for a judgment on the pleadings movant to show "clear[] entitle[ment]" to a favorable ruling, *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499, we cannot conclude that defendants "clearly" demonstrated lack of waiver of governmental immunity by the City's purchase of the National Casualty policy. The trial court's denial of defendants' motion on plaintiff's wrongful termination claim is therefore affirmed.

II. Breach of Contract

[3] Plaintiff's second cause of action asserted breach of contract by virtue of defendants' contravention of City policies and ordinances which prohibited termination of a non-probationary employee except for good cause and also provided immediate review of any termination by the Board. We affirm the trial court's denial of defendants' motion as to the City, but reverse the ruling with respect to the individual defendants sued in their official capacities.

Preliminarily, we assume plaintiff's wrongful termination and breach of contract claims to have been advanced in the alternative. Wrongful termination may be asserted "only in the context of employees at will," and not by an employee "employed for a definite term or . . . subject to discharge only for 'just cause.'" *Wagoner v. Elkin City Schools' Bd. of Education*, 113 N.C. App. 579, 588, 440 S.E.2d 119, 125, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994) (citation omitted).

We further note that sovereign immunity does not apply to breach of contract claims. Whenever a sovereign enters into a valid contract, it "implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). Although *Smith* specifically refers only to contracts entered into by the "State," *id.*, municipal sovereign immunity is attained in derivation of state sovereign immunity. *See* 18 Eugene McQuillin, *The Law of Municipal Corporations* § 53.24, at

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310 (3d ed. 1993) ("[a] municipality derives its general tort immunity from the state because it is deemed to act as the state's arm or agent when performing governmental functions"), and 63 C.J.S.2d Municipal Corporations § 746, at 30-32 ("the city in exercising governmental functions does so under delegated powers from the state or as an agency of the sovereign, and acts under the same immunity, if any, enjoyed by the state"). Thus, the rule of *Smith v. State* applies to municipalities.

A viable claim for breach of an employment contract must allege the existence of contractual terms regarding the duration or means of terminating employment. *Tatum v. Brown*, 29 N.C. App. 504, 505, 224 S.E.2d 698, 699 (1976). Plaintiff's complaint addressed this requirement by alleging that the City's charter, ordinances and written policies created an agreement whereby he would not be terminated except for "good cause" and that termination would be subject to review by the Board.

Defendants, citing N.C.G.S. § 160A-16 (1994), respond that, the foregoing notwithstanding, plaintiff fell afoul of the rule that "[a]ll contracts made by or on behalf of a city [must] be in writing" in order to be enforceable. However, plaintiff further specifically alleged the City policies entitling him to a Board hearing were "written." Moreover, as defendants conceded at oral argument, whether the City's charter, ordinances and personnel policies became a part of plaintiff's employment contract would not be an issue properly adjudicated on the pleadings. See *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83-84 (1985), *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986) (unilaterally promulgated employment manuals or policies not part of employment contract unless expressly included therein). Judgment on the pleadings is improper where there exists a material issue of fact, *Hedrick*, 121 N.C. App. at 468-69, 466 S.E.2d at 283, and we therefore affirm the trial court's denial of defendant City's motion as to plaintiff's breach of contract claim.

[4] However, the trial court erred in denying defendants' motion with respect to the individual defendants. The complaint alleged plaintiff was hired by the City for employment as a City police officer, not by any of the individual defendants. See *Sides v. Duke University*, 74 N.C. App. 331, 345, 328 S.E.2d 818, 828, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985) (trial court properly dismissed wrongful discharge and breach of contract claims against individual defendants where plaintiff alleged her employment contract was with Duke

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University rather than with individual defendants). Accordingly, we reverse the trial court's denial of defendants' motion with respect to the claim for breach of contract against the individual defendants sued in their official capacities.

III. Libel and Slander

[5] Plaintiff next asserted that (1) on or about 27 January 1994, Jarvis prepared and published a memorandum stating plaintiff had engaged in criminal activities and (2) in July 1994, Grant testified before the Iredell County Grand Jury concerning these same criminal accusations. Plaintiff further alleged the actions of Jarvis and Grant and the resulting criminal charges damaged his reputation and constituted libel and slander *per se*. We reverse the trial court's denial of defendants' motion regarding these claims.

The National Casualty policy excludes claims against the insured for libel and slander and thus does not waive governmental immunity. *Dickens*, 110 N.C. App. at 44, 429 S.E.2d at 179. The General Star policy sets out an exclusion for "personal injury" arising out of any "[c]oercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or other employment-related practices, policies, acts or omissions." This policy further excludes coverage for "[p]ersonal injury" to an "employee of the insured . . . arising out of and in the course of employment by the insured." The definitional section defines personal injury to include "[o]ral or written publication of material that slanders or libels a person."

Allegations in plaintiff's complaint that Jarvis, in his role as a Department supervisor, had prepared and disseminated a memorandum which contained statements defamatory to plaintiff, thus constituted assertion of an employment-related defamation excluded by the General Star policy. Accordingly, governmental immunity was not waived by the City's purchase of that policy, *see id.*, and the trial court erred in denying defendants' motion as to plaintiff's libel and slander claims against Jarvis in his official capacity.

[6] With respect to Grant's testimony to the grand jury, we note initially that the parties do not address the obstacles which plaintiff might face in attempting to present evidence in support of his slander claim against Grant should we decide defendants' motion was properly denied as to such claim. See N.C.G.S. § 15A-623(e) (1997) (grand jury proceedings secret and "all persons present . . . shall keep its

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secrets and refrain from disclosing anything which transpires" during sessions thereof). As defendants' motion was based solely upon the allegations of plaintiff's complaint, we likewise do not discuss this issue.

The law is settled in this jurisdiction that

a defamatory statement made by a witness in the due course of a judicial proceeding, which is material to the inquiry, is absolutely privileged, and cannot be made the basis of an action for libel or slander, even though the testimony is given with express malice and knowledge of its falsity.

Bailey v. McGill, 247 N.C. 286, 293, 100 S.E.2d 860, 866 (1957).

The public policy and rationale underlying the privilege is grounded upon the proper and efficient administration of justice. 50 Am. Jur. 2d *Libel and Slander* § 299 (1964). Participants in the judicial process must be able to testify or otherwise take part without being hampered by fear of defamation suits. *Id.*

In determining whether or not a statement is made in the course of a judicial proceeding, the court must decide as a matter of law whether the alleged defamatory statements are sufficiently relevant to the issues involved in a proposed or ongoing judicial proceeding,

Harris v. NCNB, 85 N.C. App. 669, 672, 355 S.E.2d 838, 841 (1987), so as to qualify for the privilege. The test for relevancy is generous. *See Scott v. Veneer Co.*, 240 N.C. 73, 76, 81 S.E.2d 146, 149 (1954) ("the matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety"). Further, "judicial proceeding" has been liberally defined, encompassing much more than civil litigation or criminal trials. *Harris*, 85 N.C. App. at 673, 355 S.E.2d at 842. *See, e.g., Scott*, 240 N.C. at 76, 81 S.E.2d at 149 (absolute privilege applies to statements made in pleadings and other papers filed in a judicial proceeding); *Jarman v. Offutt*, 239 N.C. 468, 472, 80 S.E.2d 248, 252 (1954) ("lunacy proceeding is a judicial proceeding within the rule of absolute privilege"); *Harris*, 85 N.C. App. at 674, 355 S.E.2d at 842 (absolute privilege extends to out-of-court communications relevant to proposed judicial proceedings); and *Angel v. Ward*, 43 N.C. App. 288, 293-94, 258 S.E.2d 788, 792 (1979) (absolute privilege applicable to communications in adminis-

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trative proceedings where officer or agency exercises quasi-judicial function).

Whether a grand jury hearing constitutes a judicial proceeding within the meaning of the absolute privilege rule appears to be an issue of first impression in this jurisdiction. We are satisfied, however, given the broad definition of "judicial proceeding" and the policy bases supporting the rule of privilege accorded to statements rendered in the course of such a proceeding, that the question is resolved in the affirmative.

We note first that the Restatement (Second) of Torts § 589, comment f (1977), provides that witnesses testifying before a grand jury are afforded absolute immunity. Further, the liberal definition of relevancy sustains the protection of the absolute privilege rule to Grant's statements to the grand jury regarding plaintiff's alleged criminal conduct. We therefore reverse the trial court's denial of defendants' motion regarding plaintiff's slander claim against Grant.

IV. Malicious Prosecution and False Arrest

[7] Plaintiff's fourth claim for relief maintained the City, with the knowledge and intentional actions of City Manager King, Chief Warshaw and Jarvis, caused criminal charges to be brought maliciously against plaintiff without probable cause and with the intent to intimidate plaintiff into withdrawing or dismissing his declaratory judgment action. Plaintiff further alleged said charges were terminated in plaintiff's favor.

The National Casualty policy specifically excludes coverage for "false arrest" and "malicious prosecution," thereby preserving the defense of governmental immunity as to those claims. We therefore turn to the General Star policy.

Defendants argue the exclusion therein of personal injury "arising out of and in the course of employment" and for claims against "an insured for acts of another officer or employee unless said officer or employee is also insured for said acts in a policy of insurance issued by us" applies to plaintiff's malicious prosecution and false arrest claims, which are thereby precluded by governmental immunity. We cannot agree.

As stated above, exclusionary provisions are not favored in the law and will be strictly construed in favor of coverage. *State Capital*, 318 N.C. at 538, 350 S.E.2d at 68. Both exclusions relied upon by

defendants appear contingent upon plaintiff having been employed at the time of the complained injury.

The first provision excludes claims “arising out of and in the course of employment.” Nowhere in the policy is this phraseology defined. However, the American Heritage Dictionary (1982) indicates the term “in the course of” means duration. *See Insurance Co. v. Insurance Co.*, 266 N.C. 430, 438, 146 S.E.2d 410, 416 (1966) (definitions contained in “standard, nonlegal dictionaries may be a more reliable guide to the construction of an insurance contract than definitions found in law dictionaries”). The provision, then, would apply to personal injuries occurring within the duration of employment, or during the employment of the complainant. The second provision, excluding claims for “acts of *another* officer or employee,” likewise suggests the injury must have occurred while plaintiff was an employee so as to have been injured by “another” employee.

It is undisputed that plaintiff was terminated 28 January 1994. His complaint alleged Grant testified before the grand jury at least four times between February 1994 and June 1994. Further, it is uncontradicted that plaintiff was arrested 13 July 1994. Thus, the events constituting the injuries as alleged in the complaint occurred at a time when plaintiff was no longer in the employ of the City. Accordingly, any injury alleged by plaintiff may not fairly be characterized as having occurred “in the course of employment” so as to be excluded under the General Star policy, and defendants have otherwise failed to demonstrate their “clear” entitlement to judgment on the pleadings. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d 499. We therefore affirm the trial court’s denial of defendants’ motion as to plaintiff’s malicious prosecution and false arrest claims.

V. Negligent Supervision and Negligent Retention

[8] Plaintiff claimed the City was negligent in exercising its supervisory responsibilities. He contends the National Casualty policy provides coverage for this claim and that no exclusion applies, except as to emotional distress. Plaintiff separately alleged the City knew or should have known of “the alleged actions and inactions” of its supervisory employees in the Department, and that the City’s negligent retention of such supervisors was a proximate cause of plaintiff’s damages. We analyze these separate claims jointly in the interest of judicial economy and affirm the trial court’s ruling with respect to each.

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Defendants assert that plaintiff's negligent supervision and negligent retention claims are excluded under the General Star policy's exclusion for personal injury arising out of and in the course of employment by the insured, and that governmental immunity was not waived by the City's purchase of that policy. We do not disagree and therefore proceed to consider the provisions of the National Casualty policy.

Defendants rely on the National Casualty policy exclusion for claims

[a]rising out of operational law enforcement functions and activities including the operation of adult and juvenile detention facilities.

However, this exclusion is ambiguous as applied to the facts *sub judice*.

First, the terminology "operational law enforcement functions" is nowhere defined in the policy. Moreover, the phrase in context suggests connection with the operation of institutional facilities. Further, we again note that ambiguity in a contract of insurance is to be resolved in favor of the insured. *Durham City Bd. of Education v. National Union Fire Ins. Co.*, 109 N.C. App. 152, 156, 426 S.E.2d 451, 453, *disc. review denied*, 333 N.C. 790, 431 S.E.2d 22 (1993). This is especially true where, as here, the ambiguity occurs in an exclusion; exclusions are not favored in the law and are to be strictly construed to provide coverage otherwise afforded by the policy. *Id.* Defendants have therefore failed to show there is no material issue of fact and that they are clearly entitled to judgment as a matter of law on plaintiff's claims of negligent supervision and negligent retention. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499.

Defendants' further argument that these claims are excluded from coverage by National Casualty's exclusion "[f]or any damage arising from . . . emotional distress," and that governmental immunity thus was not waived, is similarly unpersuasive. Defendants repeat their assertion that plaintiff seeks damages for emotional distress as evidenced by plaintiff's interrogatory responses. We reiterate that interrogatories are not properly considered by the trial court in ruling on a motion for judgment on the pleadings, *see Minor*, 70 N.C. App. at 78, 318 S.E.2d at 867, and the record in any event fails to reflect the trial court's consideration thereof on defendants' motion.

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VI. Violations of 42 U.S.C. § 1983

[9] Plaintiff's complaint also asserted, pursuant to 42 U.S.C. § 1983 (§ 1983), violation of his civil and constitutional rights by denial of the right to immediate appeal of his termination to the Board as provided in the charter, ordinances and policies of the City. Plaintiff's claimed violations fell under two headings, due process and compelled statement; however, it is unnecessary to address each individually. Likewise, we need not address defendants' policies in discussing these claims.

Municipalities enjoy no immunity from suit, either absolute or qualified, under § 1983. *Hawkins v. State of North Carolina*, 117 N.C. App. 615, 625, 453 S.E.2d 233, 238-39 (1995). However, a municipality may not be held liable under § 1983 unless a municipal policy or custom caused the constitutional injury. *Id.* at 625, 453 S.E.2d at 239. Plaintiff herein has failed to allege he was harmed pursuant to a custom or policy of the City, and plaintiff thus has asserted no viable § 1983 claim against the City.

In addition, a § 1983 claim against local government officials is essentially an alternative way of pleading such action against the local governmental entity itself. *Morrison-Tiffin*, 117 N.C. App. at 503, 451 S.E.2d at 657. Because plaintiff has not alleged he was injured pursuant to a custom or a policy of the City, his § 1983 claim must also fail as against the defendants in their official capacity. *Id.* Accordingly, we reverse the trial court's denial of defendants' motion with respect to plaintiff's § 1983 claims.

VII. Violations of N.C.G.S. § 160A-168

[10] Plaintiff also alleged Warshaw and Jarvis published information from the Internal Affairs investigation to certain officers in Statesville, to the Department and to the Charlotte/Mecklenburg Police Department in violation of N.C.G.S. § 160A-168 (1994). Without turning to defendants' policies, we note the statute specifies violation thereof to be criminal, *i.e.*, a "misdemeanor," G.S. § 160A-168 (e) and (f), and authorizes fines of no more than \$500 in the discretion of the court upon conviction. Plaintiff insists the section creates a civil cause of action when neither the language of the statute nor any case law cited by plaintiff interpreting the statute so provide. *See also Lenzer v. Flaherty*, 106 N.C. App. 496, 514, 418 S.E.2d 276, 287, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 348 (1992) ("claim against defendant employees [of Department of Human Resources] individu-

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ally for monetary damages under N.C.G.S. § 122C-66(b)," which provides as misdemeanor punishable by fine the failure to report abuse of patients in facilities licensed under Chapter 122C, properly dismissed because the "statutory provision is criminal in nature and does not create the sweeping remedy urged by plaintiff"). The trial court's denial of defendants' motion as to plaintiff's claim under G.S. § 160A-168 is therefore reversed.

VIII. Blacklisting

[11] Plaintiff further asserted Chief Warshaw intentionally interfered with plaintiff's employment opportunities by written and oral publication of false and erroneous information in violation of N.C.G.S. § 14-355 (1993).

The section authorizes a cause of action for "penal," that is, punitive, *see Black's Law Dictionary* 1019-20 (5th ed. 1979), damages only. *See Seward v. R.R.*, 159 N.C. 241, 252, 75 S.E. 34, 38 (1912) (historical purpose of provision for penal damages in section is difficulty of proof of compensatory damages). However, punitive damages may not be recovered against a municipality absent statutory authorization, *Long v. City of Charlotte*, 306 N.C. 187, 208, 293 S.E.2d 101, 115 (1982), which G.S. § 14-355 fails to provide. Further, because a cause of action against an officer in his official capacity is essentially a claim against the City, plaintiff likewise may not seek punitive damages from Chief Warshaw in his official capacity. *See Kentucky v. Graham*, 473 U.S. 159, 165-66, 87 L. Ed. 2d 114, 121 (1985) ("[a]s long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity"). The trial court therefore erred in denying defendants' motion as to plaintiff's claims against defendants based upon G.S. § 14-355.

IX. Civil Conspiracy

[12] Finally, plaintiff's complaint alleged the individual defendants, as employees of the City, conspired to deprive him of his employment, to deprive him of a Board hearing and to bring criminal charges against him. We believe the trial court erroneously denied defendants' motion as applied to this claim.

Plaintiff correctly states that a civil conspiracy claim consists of an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way, which agreement resulted in injury to the plaintiff. *Stewart v. Kopp*, 118 N.C. App. 161, 165, 454

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S.E.2d 672, 675, *disc. review denied*, 340 N.C. 263, 456 S.E.2d 838 (1995). However, “[a] municipality as such may not ordinarily be a party to a conspiracy.” 18 McQuillin § 53.13 at 222; *see also Charlton v. City of Hialeah*, 188 F.2d 421, 422 (5th Cir. 1951) (“[i]t is easy to understand how officers exercising the authority delegated to a town or city might, in their individual capacity, be a party to a conspiracy; but a municipal corporation, which is limited by law to the purposes and objects of its creation . . . cannot in its sovereign or municipal capacity be a party to a conspiracy”). Plaintiff’s complaint contained no allegation the asserted conspiracy fell outside the general rule. Similarly, because a claim against persons in their official capacities is essentially one against the state for purposes of applying governmental immunity, *Dickens*, 110 N.C. App. at 45, 429 S.E.2d at 180, such persons in their official capacities also cannot ordinarily be parties to a conspiracy. We therefore reverse the trial court’s denial of defendants’ motion on this claim.

Prior to concluding, we note plaintiff’s brief discusses twelve claims for relief. The twelfth claim was added in an amended complaint allowed by order entered 6 September 1996 and filed 9 September 1996. The instant appeal is from denial of defendants’ motion in an order entered 3 September 1996 and filed 6 September 1996. Plaintiff’s twelfth claim thus was not before the trial court at the time of the order from which defendants appeal. Arguments addressed to that claim therefore are not properly before us, and we do not address them.

To summarize, the trial court’s denial of defendants’ motion with respect to plaintiff’s claims of wrongful termination, breach of contract against the City, malicious prosecution, false arrest, negligent supervision and negligent retention is affirmed. Denial of the motion regarding plaintiff’s claims of breach of contract against the individual defendants sued in their official capacities, and against defendants for libel and slander, violation of § 1983, violation of G.S. § 160A-168, blacklisting and civil conspiracy is reversed.

Affirmed in part, reversed in part.

Judges GREENE and WALKER concur.

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SAMMY LIPTRAP, KEITH M. TUTTLE, TOMMY McARTHUR, GARLAND B. ALFORD, IRVIN L. AVANT, JR., WILLIAM M. AYCOTH, JAMES C. BALDWIN, JAMES F. BARBRY, JR., LARRY D. BENFIELD, ROBERT L. BENSON, JR., PAUL G. BLACKBURN, KAREN H. BREWER, RICHARD BREWER, ELLIOTT M. BROCK, DENNIS K. BRYANT, DANNY L. BUCKNER, MITCHELL L. COCKERHAM, CLETUS F. COMBS, BOBBY GRAY COOK, RALPH L. CUMBLEDGE, KENNETH E. DAVIS, GEORGE FRANKLIN DEAL, RAYFORD L. DEAL, DARYL EUGENE DELAGRANGE, ALFRED C. DENNIS, ROBERT L. DILLS, DEBRA DUNCAN, ALFRED KEITH EDWARDS, STEVEN LEE EMBLER, RONNIE D. GARRIS, ROBERT L. GILL, JR., JAY DENNIS GRANT, MARILYN GROOME, JOSEPH L. GUTHRIE, ELBY D. HATFIELD, SR., EDWIN LAVON HAZELTON, GEORGE EARL JONES, JACK E. JONES, JR., RONNIE CLINTON JONES, JOSEPH CORBITT LASSITER, JAY LEONARD, STEPHEN RADCLIFFE MADISON, DORIS MALACTRAS, RONALD JAMES McGuIRE, RONALD McMAHAN, WENDALL K. MICHAEL, LOUIS H. NEAL, LARRY P. NEWSOM, CHARLES CLINT PASSMORE, JEFFREY L. PATTON, PAULA D. PEACE, KEITH M. PRICE, CLAYTON LEE PROCTOR, JR., M. THOMAS REID, JAMES RICKS, JR., MICHAEL J. SAUNDERS, DIANA P. SHEFFIELD, EXECUTRIX OF THE ESTATE OF JAMES RANDALL SHEFFIELD DECEASED, TERRY E. SHOAF, PAUL DANIEL SNIPES, JR., JERRY W. STEELE, RANDY T. SURRATT, GEORGE T. TATE, III, RALPH W. TAYLOR, JERRY WAYNE THOMAS, PHIL W. THOMPSON, ARCHIE L. THORNE, DAVID TROTTER, JERRY TUCKER, DANNY W. TURNER, RANDALL LEE WAY, JOHN MICHAEL WAYNE, STEPHEN DOUGLAS WHITE, WILLIAM E. WHITEHART, CARL D. WILLS, SR., STEVE T. YARBROUGH, MARTHA JO YOUNTS, AND RICK M. ZACHARY, PLAINTIFFS v. CITY OF HIGH POINT, NORTH CAROLINA, DEFENDANT

No. COA97-392

(Filed 20 January 1998)

Limitations, Repose, and Laches § 55 (NCI4th)—city employees—resolution freezing longevity pay—breach of contract—statute of limitations

Claims by current or retired city employees for breach of a contract created when the city council passed an ordinance establishing a longevity pay plan accrued on the date the city council passed a resolution freezing the amount of annual longevity payments, not on the dates on which the city refused to pay additional amounts to plaintiff employees reaching greater increments of service in accordance with the schedule contained in the ordinance. Therefore, plaintiffs' claims were barred by the statute of limitations set forth in N.C.G.S. § 1-53(1) where they were not filed within two years after the date of the council's resolution.

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Appeal by plaintiffs from order entered 13 January 1997 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 20 November 1997.

Smith, Follin & James, L.L.P., by Margaret Rowlett, for plaintiff appellants.

City Attorney Fred P. Baggett for defendant appellee.

SMITH, Judge.

In 1966, the City Council of High Point, North Carolina enacted an ordinance establishing a longevity pay plan for defendant City of High Point's employees. The ordinance provided for annual longevity payments that would increase in five-year increments. On 4 June 1992, the City Council passed a resolution freezing the amount of the annual longevity payments to the same dollar amount as paid out in December of 1991.

In their complaint, plaintiffs, who are current or retired employees of the City hired prior to 1982, alleged that those plaintiffs hired prior to the enactment of the 1966 ordinance accepted the City's offer of annual longevity pay, and that the terms of the ordinance vested when they continued their employment with the City. Plaintiffs further alleged that those plaintiffs hired after the enactment of the ordinance accepted employment under the terms of the ordinance which vested and became part of their employment contracts.

Plaintiffs filed this action on 20 November 1996 claiming that the City's resolution freezing the amount of their longevity pay and subsequent refusals to pay additional amounts to those plaintiffs reaching greater increments of service, constituted and continue to constitute breaches of their employment contracts. The City thereafter filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990) on the ground that plaintiffs' action was barred by the two-year statute of limitations set forth in N.C. Gen. Stat. § 1-53(1) (1996). The trial court granted this motion.

On appeal, plaintiffs contend the trial court erred by granting the City's motion to dismiss. Plaintiffs argue that the 1966 ordinance imposed a continuing obligation on the City to make the increased longevity payments in accordance with the schedule contained in that ordinance. Therefore, plaintiffs claim the City's resolution freezing the amount of longevity pay and subsequent refusals to pay additional amounts to those plaintiffs reaching greater increments of

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service constituted separate breaches of contract, each of which triggered a new statute of limitations period. While plaintiffs concede they are not entitled to damages for longevity pay owed to them more than two years prior to the filing of this action, they claim they are entitled to amounts that should have been paid to them beginning two years prior to the filing of this action, and amounts they will be owed in future years. The City argues that plaintiffs' cause of action accrued and the statute of limitations began to run upon the passage of the City Council's 1992 resolution freezing the amount of longevity pay, and that plaintiffs' claim is thus time barred since it was not filed within two years of that date.

When hearing a motion to dismiss, the court must decide "‘whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. . . .’" *Soderlund v. N.C. School of the Arts*, 125 N.C. App. 386, 389, 481 S.E.2d 336, 338 (1997) (quoting *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987)). The statute of limitations may provide the basis for dismissal on a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) if the face of the complaint establishes that plaintiff's claim is barred. *Soderlund*, 125 N.C. App. at 389, 481 S.E.2d at 338.

N.C. Gen. Stat. § 1-53(1) provides that an action against a local unit of government based on a contract, obligation or liability arising out of contract must be filed within two years of the accrual of the cause of action. *See also* N.C. Gen. Stat. § 1-15 (1996) ("Civil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute.") Generally, a cause of action accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985). "[A]s soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run. It does not matter that further damage could occur; such further damage is only aggravation of the original injury." *Pembee Mfg. Corp. v. Cape Fear Const. Co.*, 313 N.C. 488, 493, 329 S.E.2d 350, 354 (1985). In an action for breach of contract, the statute begins to run on the date the promise is broken. *Penley*, 314 N.C. at 20, 332 S.E.2d at 62. *See also* 18 Samuel Williston, *A Treatise on the Law of Contracts* § 2021A (3d ed. 1978) ("The general rule governing the commencement of the running of the Statute is that the statutory

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period is computed from the time when the right of action which the plaintiff seeks to enforce first accrued, that is . . . as soon as there is a breach of contract.”)

Based on the foregoing principles, we conclude plaintiffs’ claims are barred by the statute of limitations. Plaintiffs’ cause of action accrued on 4 June 1992, the day the City Council passed the resolution freezing the amount of longevity pay and breached their contracts with plaintiffs, despite the fact that the 1966 ordinance imposed on the City the obligation to make increased payments in accordance with the schedule contained in that ordinance. We do not consider the subsequent refusals of the City to pay additional amounts to those plaintiffs reaching greater increments of service as a series of multiple breaches. The effect of the subsequent refusals “is only aggravation of the original injury.” *Pembee Mfg. Corp.*, 313 N.C. at 493, 329 S.E.2d at 354. Because plaintiffs were entitled to maintain an action for breach of contract on 4 June 1992, they were required by N.C. Gen. Stat. § 1-53(1) to file this action within two years of that date.

Plaintiffs cite several cases in support of their argument that the facts of the instant case present multiple breaches of contract, with each breach triggering a new statute of limitations period. Plaintiffs first cite the portion of *Haywood Street Redevelopment Corp. v. Peterson, Co.*, 120 N.C. App. 832, 463 S.E.2d 564 (1995), *disc. review denied*, 342 N.C. 655, 467 S.E.2d 712 (1996), dealing with an express warranty claim. In *Haywood*, defendant contracted with plaintiff to install a waterproofing surface on plaintiff’s parking deck and provided plaintiff a written express warranty on the waterproofing extending from 15 June 1988 until 15 March 1993. *Id.* at 834, 463 S.E.2d at 565. This Court held that “the warranty was a guarantee that the waterproofing would be free of defects through 15 March 1993 and on each day the waterproofing was not free of defects, there was a new breach of the agreement. With the occurrence of each breach, a new cause of action accrued.” *Id.* at 836-37, 463 S.E.2d at 567. We do not believe *Haywood* controls the instant case, as *Haywood* involves a breach of warranty claim and not a breach of contract claim. In fact, this Court affirmed the trial court’s dismissal of plaintiff’s breach of contract claim in *Haywood* as being barred by the statute of limitations. *Id.* at 836, 463 S.E.2d at 566. Further, plaintiff brought its action for breach of warranty while the express warranty was still in effect. Thus, *Haywood* does not support the conclusion that multiple breaches of contract occurred in the instant case.

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Plaintiffs next cite *Martin v. Ray Lackey Enterprises*, 100 N.C. App. 349, 396 S.E.2d 327 (1990) to support their theory of multiple breaches of contract in the case at bar. In *Martin*, plaintiff leased certain property to defendants to be used as a restaurant. *Id.* at 351, 396 S.E.2d at 329. The lease provided that defendant was required to "pay and discharge . . . all real estate taxes and assessments levied upon and assessed against the premises. . . ." *Id.* Plaintiff subsequently filed an action against defendants for allegedly breaching the lease by failing to pay the real estate taxes as they became due. *Id.* Defendants raised the statute of limitations as a defense. *Id.* at 356, 396 S.E.2d at 332. On appeal, we noted that "[g]enerally, where obligations are payable in installments, the statute of limitations runs against each installment independently as it becomes due[,]" and held that since defendants' tax obligation became due on an annual basis, the statute of limitations ran independently on each annual default. *Id.* at 357-58, 396 S.E.2d at 332. However, we also noted the language of the lease made clear the "intent of the parties was that breach would occur when the lessee failed to pay the real estate taxes levied against the property as they came due." *Id.* at 354, 396 S.E.2d at 331. In the instant case there is no express language defining what constitutes a breach of the parties' agreement. We therefore do not find *Martin* instructive.

Finally, plaintiffs cite *U.S. Leasing Corp. v. Everett, Creech, Hancock and Herzig*, 88 N.C. App. 418, 363 S.E.2d 665, disc. reviews denied, 322 N.C. 329, 369 S.E.2d 364 (1988), in support of their argument that multiple breaches have occurred in the instant case. In *U.S. Leasing Corp.*, plaintiff alleged it leased office equipment to a law firm and that the firm defaulted in making payments under the lease agreement, which provided for 60 monthly payments. *Id.* at 422, 363 S.E.2d at 667. Plaintiff filed an action against several defendants for breach of contract, but the trial court dismissed the action against three defendants as being barred by the statute of limitations. *Id.* at 421, 363 S.E.2d at 666. We noted that "[t]he general rule in the case of an obligation payable by installments is that the statute of limitations runs against each installment individually from the time it becomes due . . ." and held that each payment required by the agreement was a debt which renewed the statute of limitations as to that payment. *Id.* at 426, 363 S.E.2d at 669. However, we observed that a provision in the parties' agreement expressly allowed plaintiff "to seek recovery of each payment as it became due." *Id.* at 427, 363 S.E.2d at 669. Because there is no express provision in the contracts in the case *sub*

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judice allowing plaintiffs to seek recovery of each longevity payment as it became due, we do not find *U.S. Leasing Corp.* controlling.

The City argues that *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 424 S.E.2d 420, *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993) (*Faulkenbury I*), is analogous to the instant case and supports the dismissal of plaintiffs' claims as being barred by the statute of limitations. Plaintiffs respond that *Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 345 N.C. 683, 483 S.E.2d 422 (1997) (*Faulkenbury II*) is more comparable to the instant case than *Faulkenbury I* and supports the argument of multiple breaches of their employment contracts, with each breach triggering a new statute of limitations period.

In *Faulkenbury I*, plaintiff Dorothy M. Faulkenbury alleged she was a disability retired schoolteacher who retired in 1983 and was a vested member of the Teachers' and State Employees' Retirement System of North Carolina eligible for a disability retirement pension. 108 N.C. App. at 362, 424 S.E.2d at 421-22. She further alleged that statutory changes made in 1982 to the method of calculation of disability retirement benefits caused underpayments in her benefits and the benefits of those similarly situated. *Id.* at 362-63, 424 S.E.2d at 422. Plaintiff had filed suit against several parties, including the State and the Teachers' and State Employees' Retirement System, alleging that the statutory modification of the calculation of disability retirement benefits violated their due process and equal protection rights under 42 U.S.C. § 1983, constituted an unconstitutional impairment of the obligations of contracts under Art. I, § 10 of the United States Constitution, and constituted a breach of fiduciary duty. *Id.* at 363, 424 S.E.2d at 422. The trial court subsequently certified the action as a class action. *Id.* Plaintiffs sought a declaratory judgment stating that the statutory modification was unconstitutional as applied and that they were entitled to receive benefits calculated under the previous method of calculation. *Id.* The trial court denied defendants' motions to dismiss the complaint. *Id.* at 365, 424 S.E.2d at 423.

On appeal, this Court reversed the trial court's denial of defendants' motion to dismiss plaintiffs' 42 U.S.C. § 1983 claims and held that the statute of limitations had expired. *Id.* at 369, 424 S.E.2d at 426. Plaintiffs had argued that each monthly disability payment after the statutory modification constituted a separate violation of 42 U.S.C. § 1983, and that since the violations were ongoing, the three-

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year statute of limitations applicable to section 1983 claims had not expired when plaintiffs commenced their action. *Faulkenbury*, 108 N.C. App. at 368, 424 S.E.2d at 425. In holding that the continuing violation doctrine did not apply to that case, we observed:

While we acknowledge that the distinction between on-going violations and continuing effects of an initial violation is subtle, we are of the opinion that this case demonstrates the latter. Here the plaintiffs suffer from the continuing effects of the defendants' original action of amending the statute. We do not believe that each payment constitutes a discriminatory act rising to the level of a violation.

Id. at 369, 424 S.E.2d at 425. We then went on to affirm the trial court's denial of defendants' motion to dismiss plaintiffs' impairment of contract claim on the basis of the statute of limitations, since defendants did not address the statute of limitations issue with respect to that claim and the argument was therefore deemed abandoned. *Id.* at 372, 424 S.E.2d at 427. On remand, the trial court found that the change in the method of calculating plaintiffs' disability retirement benefits impaired the obligations of a contract in violation of Art. I, § 10 of the United States Constitution. *Faulkenbury*, 345 N.C. at 689, 483 S.E.2d at 426.

On the second appeal (*Faulkenbury II*), defendants argued that the trial court erroneously held the applicable statutes of limitation for plaintiffs' impairment of contract claim were N.C. Gen. Stat. § 128-27(i) (1995) and N.C. Gen. Stat. § 135-5(n) (1995). *Faulkenbury*, 345 N.C. at 694, 483 S.E.2d at 429. These sections contain identical provisions and provide that:

No action shall be commenced against the State or the Retirement System by any retired member or beneficiary respecting any deficiency in the payment of benefits more than three years after such deficient payment was made, and no action shall be commenced by the State or the Retirement System against any retired member or former member or beneficiary respecting any overpayment of benefits or contributions more than three years after such overpayment was made.

N.C. Gen. Stat. § 128-27(i) (local government employees); N.C. Gen. Stat. § 135-5(n) (state government employees). Defendants further argued that plaintiffs were not suffering from a continuing wrong, that if there was a wrong, it occurred when plaintiffs retired and were

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paid less than they would have been before the statutory modification. As a result, defendants argued that all claims arising more than three years before the filing of the action were barred by the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52(1). *Faulkenbury*, 345 N.C. at 695, 483 S.E.2d at 429.

Our Supreme Court, in *Faulkenbury II*, held that the reductions in plaintiffs' disability payments under the new method of calculation "were deficiencies which have continued to the present time." *Id.* The Court further held that N.C. Gen. Stat. § 128-27(i) and N.C. Gen. Stat. § 135-5(n) were applicable to the case and that these sections specifically allowed plaintiffs to pursue claims for underpayments for three years prior to the commencement of their action. *Id.* at 695, 483 S.E.2d at 429-30.

We believe both *Faulkenbury I* and *II* are distinguishable from the instant case. First, *Faulkenbury I* deals with the statute of limitations in terms of a section 1983 claim brought on due process and equal protection grounds, and *Faulkenbury II* deals with the statute of limitations in terms of an impairment of contract claim pursuant to Art. I, § 10 of the United States Constitution. Each of these types of claims differs significantly from the common law breach of contract claim brought by plaintiffs in the instant case. See *Stewart v. Hunt*, 598 F. Supp. 1342, 1353 (E.D.N.C. 1984) ("§ 1983 imposes liability solely for violations of rights protected by the Constitution and federal law, not for violations arising simply out of state tort and contract law principles[]"); *Faulkenbury*, 108 N.C. App. at 372, 424 S.E.2d at 427 ("Plaintiffs allege and make a valid claim for a constitutional impairment of contract claim, not a common law breach of contract. There is a distinct difference between these two causes of action.")

An additional factor distinguishes *Faulkenbury II* from the instant case: the existence of N.C. Gen. Stat. § 128-27(i) and N.C. Gen. Stat. § 135-5(n), both statutes of limitation explicitly triggered by deficient periodic payments. These statutes, which allow retired members or beneficiaries of the Retirement System to bring an action for deficient payment within three years of underpayment, contemplate that each deficient payment will trigger a new statute of limitations period. In the instant case, the applicable statute of limitations, N.C. Gen. Stat. § 1-53(1), mandates that an action for breach of contract against a local government be brought within two years of the accrual of the cause of action; it does not provide for or address any periodic obligation. As mentioned previously, plaintiffs' cause of

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action against the City accrued the day the City Council passed the resolution freezing the amount of plaintiffs' longevity pay. Once plaintiffs' cause of action accrued, plaintiffs had two years within which to file suit. Since they failed to do so, their action is barred by the statute of limitations.

For the above reasons, we conclude the trial court properly granted the City's motion to dismiss.

Affirmed.

Judges MARTIN, John C., and JOHN concur.

STATE OF NORTH CAROLINA v. TIMOTHY LAMONT JOHNSON

COA97-342

(Filed 20 January 1998)

1. Criminal Law § 357 (NCI4th Rev.)—assault and robbery—jail identification wristband—required in court—motion to strike venire—denied

The trial court did not err in a prosecution for robbery and assault by denying defendant's motion to strike the jury venire on the grounds that members of the jury pool saw defendant wearing an identification wristband required by the Mecklenburg County jail. N.C.G.S. § 15-176 prohibits a jailer, sheriff or any other officer from requiring a prisoner to appear in court for trial dressed in the uniform of a prisoner, but the wristband is not a garment and did not constitute a uniform, dress, or apparel. Furthermore, defendant wore a suit during the trial and it is common knowledge that wristbands are required by other institutions such as hospitals, so that defendant would not have been prejudiced even if some members of the jury pool saw the wristband.

2. Evidence and Witnesses § 1906 (NCI4th)—robbery and assault—photographic line-up—defendant's photo darker

The trial court did not err in a robbery and assault prosecution by denying defendant's motion to suppress an out-of-court photographic identification where the individuals in the lineup all

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possessed physical characteristics similar to defendant's and, while defendant's photograph was one of two or three that were darker than the others, there is nothing to indicate that defendant's complexion was considered in constructing the lineup. Moreover, the witness had ample opportunity to observe the robbery and assault and there was no substantial likelihood of misidentification.

3. Criminal Law § 111 (NCI4th Rev.)—robbery and assault—photographic line-up—motion to compel discovery—State's inability to locate

The trial court did not err in a prosecution for assault and robbery by denying defendant's motion to compel discovery where defendant contended that the State had failed to provide him with a second photographic lineup allegedly presented to a witness at the time she made her identification. The State's effort to learn of the existence of the alleged second lineup complied with the requirements of *Kyles v. Whitley*, 514 U.S. 419.

4. Criminal Law § 111 (NCI4th Rev.)— robbery and assault—victim's record—not disclosed

The trial court did not err in a prosecution for robbery and assault by denying defendant's motion to compel the State to produce materials favorable to the defense where the State failed to provide before trial information regarding the victim's conviction of assault on a female and incarceration for a probation violation. The State learned of the incidents when the prosecutor spoke with the witness shortly before trial, the State elicited information about them on direct examination, and defendant was afforded the opportunity to inquire into them on cross-examination. In the context of the entire record, the failure to provide this information did not create a reasonable doubt that did not otherwise exist and there is no reasonable probability that the result would have been different had the information been disclosed.

5. Evidence and Witnesses § 2983 (NCI4th)— robbery and assault—prior narcotics arrests—not admissible

The trial court did not err in a prosecution for robbery and assault by denying defendant's motion to question the victim regarding his prior arrests for possession of marijuana with intent to sell and deliver and possession of cocaine with intent to sell and deliver where the victim denied on cross-examination

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ever having possessed marijuana. Defendant was able to impeach the victim's credibility by questioning him about two prior convictions of possession of marijuana and other drug related activity, rendering inquiry into the two additional arrests cumulative at best. Moreover, the two additional arrests show nothing beyond the fact that the victim was arrested and that there was insufficient evidence to proceed; they have no tendency to prove that he was guilty. N.C.G.S. §8C-1, Rule 609.

6. Evidence and Witnesses § 2485 (NCI4th)—assault and robbery—sequestration of witnesses—conversation outside of court—no prejudice

The trial court did not abuse its discretion by denying defendant's motion to preclude further testimony from witnesses in a prosecution for assault and robbery where the court had issued a sequestration order and two witnesses spoke with each other outside of court after one had testified and the other had given her statement to an officer. Even assuming that the conversations violated the trial court's sequestration order, defendant's right to a fair trial was not prejudiced because there was no indication that their testimony was in any way influenced by their conversations.

Appeal by defendant from judgment entered 13 September 1996 by Judge Hollis M. Owens in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 November 1997.

Attorney General Michael F. Easley, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

Charles L. Morgan, Jr., for defendant appellant.

SMITH, Judge.

The State's evidence tended to show that on 14 December 1995, the victim, Lazarious Little, was visiting his grandmother at approximately 4:00 p.m. As Little left his grandmother's house and walked to his vehicle, he was approached by defendant. Defendant asked Little for money, but Little responded he had no money. Defendant then pulled out a gun and fired twice, once in the air and once at Little, striking him in the knee. As Little fell to the ground, defendant grabbed the gold chain necklace Little was wearing around his neck. Defendant also removed a gold ring from Little's finger. Defendant then walked up the street, got into a vehicle and left the scene.

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Defendant was charged with and convicted of robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury. The offenses were consolidated for judgment and defendant was sentenced to a minimum of 117 months' and a maximum of 150 months' imprisonment.

[1] In his first assignment of error, defendant contends the trial court erred by denying his motion to strike the venire on the ground that members of the jury pool saw defendant partially attired in prison garb in violation of N.C. Gen. Stat. § 15-176 (Cum. Supp. 1996). Specifically, defendant points out that he was required by the Mecklenburg County Jail to wear an identification wristband in front of members of the jury pool. Defendant argues that his wearing the wristband in front of the potential jurors predisposed them to find him guilty of the offenses with which he had been charged, and he therefore did not receive a fair trial.

N.C. Gen. Stat. § 15-176 provides in pertinent part:

It shall be unlawful for any sheriff, jailer or other officer to require any person imprisoned in jail to appear in any court for trial dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with shaven or clipped head. And no person charged with a criminal offense shall be tried in any court while dressed in the uniform or dress of a prisoner or convict, or in any uniform or apparel other than ordinary civilian's dress, or with head shaven or clipped by or under the direction and requirement of any sheriff, jailer or other officer, unless the head was shaven or clipped while such person was serving a term of imprisonment for the commission of a crime.

"[W]hile it is unlawful for any sheriff, jailer or other officer to *require* a prisoner to appear in court for trial dressed in the uniform of a prisoner, it is not necessarily unlawful for a prisoner to so appear." *State v. Berry*, 51 N.C. App. 97, 101-02, 275 S.E.2d 269, 272, *appeal dismissed and disc. review denied*, 303 N.C. 182, 280 S.E.2d 454 (1981); see also *State v. Westry*, 15 N.C. App. 1, 13, 189 S.E.2d 618, 626, *cert. denied*, 281 N.C. 763, 191 S.E.2d 360 (1972) ("nor does G.S. § 15-176 'explicitly' make it 'unlawful for a defendant to be tried in prison clothes'").

In addressing this issue, we find the definitions of the words used in N.C. Gen. Stat. § 15-176, "uniform," "dress" and "apparel," to be significant. "Uniform" is defined as "dress of a distinctive design or fash-

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ion adopted by or prescribed for members of a particular group . . . and serving as a means of identification." Webster's Third New International Dictionary 2498 (3d ed. 1971). "Dress" is defined as "utilitarian or ornamental covering for the human body: as a: clothing and accessories suitable to a specific purpose or occasion . . . c: style of clothing: manner of wearing clothes . . . covering, adornment or appearance that is appropriate or peculiar to a particular time or season . . ." *Id.* at 689. "Apparel" is defined as "2a: a person's clothing . . . b: something that clothes or adorns as if with garments . . ." *Id.* at 102.

The definitions of "uniform," "dress" and "apparel" clearly refer to garments and particular modes of dressing. Since an identification wristband is not a garment, we conclude it does not constitute "dress," "apparel" or a "uniform" for purposes of N.C. Gen. Stat. § 15-176.

Further, the record reflects that during his trial, defendant wore a suit and a shirt, which is obviously not the uniform of a prisoner. It is common knowledge that institutions other than jails, such as hospitals, require their charges to wear wristbands for the mere purpose of identification. Even if some members of the jury pool saw defendant wearing the identification wristband, he would not have been prejudiced.

[2] In his second assignment of error, defendant contends the trial court erred by denying his motion to suppress the out-of-court identification made of him by Chelita Little, Lazarious Little's cousin and a witness to the robbery and assault. Defendant argues that the photographic lineup presented to Ms. Little was impermissibly suggestive in that it represented him as having a darker complexion than the other individuals in the lineup, and, therefore, Ms. Little's identification of him should not have been admitted.

The State's evidence showed that, at the time of the robbery and assault, Ms. Little was sitting on the front porch of her grandmother's house. It was approximately 4:30 in the afternoon and the sun was out. Ms. Little saw defendant approach Lazarious Little, heard gunshots, and also saw defendant take Little's ring. She viewed the incident through the slightly tinted windows of Little's vehicle but had a direct view of Little when he was on the ground. A few months later, Officer B.J. Thomas of the Charlotte-Mecklenburg Police Department showed her a black and white photographic lineup containing six photographs, including one of defendant. The individuals in the

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lineup had physical characteristics similar to defendant in terms of age, facial hair and hair length. Ms. Little immediately identified defendant as the assailant. Officer Thomas testified that the photographic lineup was lighter around the corners because of the photocopy machine, that the machine made some photographs darker than others, and that defendant's photograph was one of two or three that were darker than the others.

The United States Supreme Court has adopted a two-part test for determining whether the admission of an out-of-court identification violates due process: (1) whether the police used an impermissibly suggestive procedure to obtain the identification, and, if so, (2) whether, under all the circumstances, the suggestive procedure gave rise to a substantial likelihood of misidentification. *Manson v. Brathwaite*, 432 U.S. 98, 107, 53 L. Ed. 2d 140, 149 (1977). The factors to be considered with respect to the second inquiry include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." *Id.* at 114, 53 L. Ed. 2d at 154. Against these factors must be weighed the corrupting effect of the suggestive identification. *Id.*

After reviewing the record, we conclude the photographic lineup presented to Ms. Little was not impermissibly suggestive. The individuals in the lineup all possessed physical characteristics similar to those of defendant. While defendant's photograph was one of two or three photographs that were darker than the others, there is nothing in the record to indicate defendant's complexion was considered by Officer Thomas in constructing the lineup. Even assuming the appearance of defendant's complexion rendered the lineup impermissibly suggestive, Ms. Little's identification would have been properly admitted. Ms. Little had ample opportunity to observe the robbery and assault. She viewed the incident, which occurred on a sunny day, through a slightly tinted vehicle window, and also had a direct view of Lazarious Little when he was on the ground. Officer Thomas presented her with the lineup approximately three months after the incident, and she immediately identified defendant as the assailant. Because these factors far outweigh any corrupting effect the appearance of defendant's complexion may have had, we perceive no substantial likelihood of misidentification in this case. The trial court thus properly denied defendant's motion to suppress the identification.

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[3] In his third assignment of error, defendant contends the trial court erred by denying his motion to compel discovery pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963); *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976); and *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977). In particular, defendant argues the State failed to provide him with a second photographic lineup allegedly presented to Chelita Little by Officer Thomas at the time she made her identification of defendant as the assailant. Defendant claims his ability to defend himself was substantially prejudiced by the State's failure to provide him with this second photographic lineup since it may have assisted in demonstrating the suggestiveness of the procedure used to obtain Ms. Little's identification of him as the assailant.

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 10 L. Ed. 2d at 218. The Court recently broadened the State's obligation in *Kyles v. Whitley*, 514 U.S. 419, 437, 131 L. Ed. 2d 490, 508 (1995), to encompass the "duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." However, there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore v. Illinois*, 408 U.S. 786, 795, 33 L. Ed. 2d 706, 713, *reh'g denied*, 409 U.S. 897, 34 L. Ed. 2d 155 (1972).

While in the instant case Ms. Little testified she was shown two sets of six photographs by Officer Thomas, Officer Thomas testified he only created one photographic lineup consisting of six pictures, including defendant's. The State, after unsuccessfully attempting to locate the second lineup, reviewed its files and even contacted Officer Thomas to confirm there were no reports missing from his file. Ultimately, the State was unable to discover a second lineup. We conclude the State's effort to learn of the existence of the alleged second lineup complied with the requirements imposed by *Kyles*, and the trial court therefore properly denied defendant's motion to compel discovery.

[4] In his fourth assignment of error, defendant contends the trial court erred by denying his motion pursuant to *Brady* requesting the State produce any and all materials favorable to his defense. Specifically, defendant argues the State failed to provide him with

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information regarding Lazarious Little's conviction of assault on a female and incarceration for a probation violation prior to trial, and that such failure prejudiced his ability to properly cross-examine Little.

In *Agurs*, 427 U.S. at 109-10, 49 L. Ed. 2d at 353, the United States Supreme Court, while discussing the appropriate standard to be applied in determining whether a prosecutor has violated the constitutional duty of disclosure of favorable materials, stated that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." The Court expressly rejected the imposition of a standard of materiality which focused on the impact of the undisclosed evidence on a defendant's ability to prepare for trial, but instead observed that:

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record.

Id. at 112, 49 L. Ed. 2d at 354-55. The Court later clarified this standard of materiality by stating that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985).

In the instant case, the State indicated it reviewed Little's record and the computer bank did not show his conviction for assault on a female and subsequent probation violation. The State learned of these incidents when the prosecutor spoke with him shortly before trial. Further, the State asked Little about his criminal record on direct examination and elicited information regarding these incidents. Defendant was then afforded the opportunity on cross-examination to inquire into these incidents. In the context of the entire record, we conclude the State's failure to provide defendant with information regarding Little's conviction for assault on a female and subsequent probation violation did not create a reasonable doubt in the case that did not otherwise exist. We further conclude there is no

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reasonable probability that had this information been disclosed to the defense, the result of the proceeding would have been different. The trial court therefore properly denied defendant's motion requesting the State produce all materials favorable to defendant.

[5] In his fifth assignment of error, defendant contends the trial court erred by denying his motion to question Little regarding Little's prior arrests for possession of marijuana with intent to sell and deliver and possession of cocaine with intent to sell and deliver, both of which charges were ultimately dismissed. Defendant argues that, since Little denied on cross-examination ever having possessed marijuana, evidence concerning these two arrests would have been relevant to impeach him despite the fact the charges were ultimately dismissed.

While N.C. Gen. Stat. § 8C-1, Rule 609 (1992) permits the introduction of convictions of crimes punishable by more than 60 days' confinement for the purpose of attacking the credibility of a witness, "[t]he general rule regarding evidence of prior charges and indictments is that '[a]ccusations that [a witness] has committed other extrinsic crimes are generally inadmissible even if evidence that [the witness] actually committed the crimes would have been admissible.'" *State v. Mills*, 332 N.C. 392, 407, 420 S.E.2d 114, 121 (1992) (quoting *State v. Meekins*, 326 N.C. 689, 699, 392 S.E.2d 346, 351 (1990)). In the instant case, when Little responded that he had never possessed marijuana, defendant was able to impeach his credibility by questioning him about two prior convictions for possession of marijuana, in addition to questioning him about other drug related activity. Thus, the effect for impeachment purposes of inquiring into the two additional arrests would have been cumulative at best.

Moreover, evidence of the two arrests would not have been relevant for the purpose of impeaching Little. Evidence is considered relevant when it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1992). The two additional arrests show nothing beyond the fact that Little was arrested and that there was insufficient evidence to proceed with the charges; they have no tendency to prove he was guilty of the offenses with which he was charged. Thus, the trial court properly denied defendant's motion to question Little about these two arrests.

[6] In his final assignment of error, defendant contends the trial court erred by denying his motion to preclude further testimony from

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Chelita Little, Sholanda Ashe and Officer Thomas for violating the trial court's sequestration order issued 9 September 1996. The record indicates that on 10 September 1996, the State called Chelita Little to the stand to testify against defendant. When court recessed for the day, she was not released as a witness. Thereafter, the prosecutor had a conversation with Ms. Little during which he asked her the name and address of Ms. Ashe, who was also to be called as a witness. The prosecutor instructed Ms. Little to contact Ms. Ashe and inform her that a police officer would be coming to her home to take her statement about the robbery and assault. Ms. Little did in fact call Ms. Ashe and informed her an officer would be stopping by her house. Officer Thomas later visited Ms. Ashe and took her statement. While doing so, he provided her with the date and month of the robbery and assault. After Officer Thomas left, Ms. Ashe called Ms. Little and informed her of what she had relayed to Officer Thomas. Ms. Little agreed with her about the specifics of the case. Defendant argues the conversations between Ms. Little and Ms. Ashe and Officer Thomas and Ms. Ashe violated the sequestration order, tainted their further testimony and denied him the right to a fair trial.

Both N.C. Gen. Stat. § 8C-1, Rule 615 (1992) and N.C. Gen. Stat. § 15A-1225 (1988) state that upon the request of a party the trial court may order witnesses sequestered to prohibit them from hearing the testimony of other witnesses. "The aim of sequestration is two-fold: First, it acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses, and second, it aids in detecting testimony that is less than candid." *State v. Harrell*, 67 N.C. App. 57, 64, 312 S.E.2d 230, 236 (1984). However, "[a]n order to sequester witnesses is issued in the sound discretion of the trial judge. . . . [I]f the order is disobeyed, the court can exclude the witness from testifying." *State v. Sings*, 35 N.C. App. 1, 3, 240 S.E.2d 471, 472 (1978).

Even assuming that the conversations between Ms. Little and Ms. Ashe and Officer Thomas and Ms. Ashe violated the sequestration order, defendant's right to a fair trial was not prejudiced by the trial court's denial of his motion to preclude further testimony from these witnesses. Ms. Little testified extensively about the robbery and assault prior to her conversations with Ms. Ashe, and Ms. Ashe gave her statement to Officer Thomas prior to her conversation with Ms. Little about the specifics of the case. There is no indication that Ms. Little's or Ms. Ashe's testimony was in any way influenced by their conversations. Further, the only information provided by Officer Thomas to Ms. Ashe was the date of the robbery and assault. We do

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not believe Ms. Ashe's testimony could have been tainted by Officer Thomas supplying her with this information. Thus, the trial court did not abuse its discretion in denying defendant's motion to preclude further testimony from these witnesses.

For the above reasons, we conclude defendant received a fair trial, free from prejudicial error.

No error.

Judges MARTIN, John C., and JOHN concur.

STATE OF NORTH CAROLINA ON RELATION OF ONSLOW COUNTY, PLAINTIFF-APPELLEE V.
DONALD E. MERCER, SR., DONALD E. MERCER, SR. D/B/A DON'S ENTER-
PRISES, AND CYNTHIA R. MAYNOR, DEFENDANTS-APPELLANTS

No. COA97-277

(Filed 20 January 1998)

**1. Abatement, Survival, and Revival of Actions § 14
(NCI4th)— public nuisance laws—adult entertainment—
abatement—pending zoning actions**

The trial court did not err by denying defendant's plea in abatement in an action in which Onslow County sought to hold the owners of adult entertainment establishments liable for violating the public nuisance laws while prior state and federal actions were pending. While there is substantial identity between the parties to the present actions and those in the prior pending actions, the same cannot be said as to the identity of the subject matter, issues involved, and relief demanded.

**2. Judgments §§ 207, 270 (NCI4th)— adult entertainment—
nuisance action—zoning action pending—not res judicata**

The trial court did not err in a nuisance action in which Onslow County sought to hold the owners of adult entertainment establishments liable for violating the public nuisance laws by denying defendants' motion to dismiss or abate under the theory of *res judicata* where there were pending federal and state actions but there was no identity of causes of action since this action was brought under N.C.G.S. § 19-19(a) and the defendant's liability in the federal action was contingent upon the validity of

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a county ordinance and there was no final judgment on the merits in the prior federal action which would preclude the present actions from being brought.

3. Judgments § 313 (NCI4th)—adult entertainment—nuisance action—zoning action pending—collateral estoppel

The State was not barred by the doctrine of collateral estoppel from bringing a claim against the owners of adult entertainment establishments where there were pending actions involving an adult zoning ordinance. Although defendants contend that the issues raised here could have been raised in the prior action, by statute Onslow County could not have brought an action to abate a public nuisance at the time the prior action was commenced. Additionally, the present action includes seven business not parties to the prior action.

Appeal by defendant-appellants from order entered 26 June 1996 by Judge James R. Strickland in Onslow County Superior Court. Heard in the Court of Appeals 28 October 1997.

Shipman & Associates, L.L.P., by Gary K. Shipman, Carl W. Thurman, III, and C. Wes Hodges, II, attorneys for plaintiff-appellee.

Lanier & Fountain, by Keith E. Fountain, attorney for defendant-appellant.

WYNN, Judge.

Under North Carolina law, to prevail in a plea in abatement, a defendant must show that the parties, subject matter, issues and relief sought are the same in both the present and prior actions. *Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 21, 387 S.E.2d 168, 172 (1990). In the present actions, the State seeks to hold defendants liable for violating the public nuisances laws of Chapter 19 of the North Carolina General Statutes; however, in the three prior and still pending actions brought against defendants, the issue of liability is premised on an Onslow County adult business ordinance. For this reason, the present and prior actions differ as to subject matter, issues to be determined and relief sought; therefore, we affirm the trial court's denial of defendants' plea in abatement. We further hold that the trial court properly denied defendants' motion to dismiss on grounds of *res judicata* and collateral estoppel.

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FACTS AND PROCEDURAL HISTORY*The Prior Pending Actions**(Mercer v. Onslow, Maynor v. Onslow, and Onslow v. Mercer)*

On 14 September 1995, defendant Donald E. Mercer, owner and operator of the "Pleasure Palace," an adult entertainment establishment in Onslow County, filed the first of the prior actions in the Onslow County Superior Court. In his complaint, Mercer sought (1) a permanent injunction prohibiting Onslow County from enforcing its Ordinance to Regulate Adult Businesses and Sexually Oriented Businesses in Onslow County and (2) a determination that the ordinance was invalid and void under both the federal and state constitutions.

Upon motion of the County, the case was removed to the United States District Court for the Eastern District of North Carolina. Subsequently, Onslow County counterclaimed to permanently enjoin Mercer from operating the "Pleasure Palace" in violation of Onslow County's ordinance. Thereafter, United States District Court Judge Terrence Boyle, denied both Mercer's and Onslow County's request for injunctive relief. In denying Onslow County's request, Judge Boyle concluded that the County's counterclaim was "a move of no legal significance" because it did not present the court with a separate "case or controversy."

From the Federal District Court's order denying injunctive relief, Mercer appealed to the United States Court of Appeals for the Fourth Circuit, which, in a *per curiam* opinion, vacated and remanded Judge Boyle's judgment with instructions that the District Court abstain from deciding the questions presented under state law but retain jurisdiction over the federal claims until such time as the parties could properly return to federal court.

On 20 September 1994, the second of the prior actions was filed against Onslow County by Cynthia R. Maynor, owner and manager of the "Doll House," another adult entertainment establishment in Onslow County. As in the first action brought against Onslow County, Maynor sought to permanently enjoin Onslow County from enforcing its ordinance and to obtain a declaration that the ordinance was invalid and void. Thereafter, both Maynor and Onslow County cross-moved for summary judgment. The trial court denied summary judgment for Maynor, granted summary judgment for Onslow County and permanently enjoined Maynor from operating the "Doll House" as a nonconforming adult business in violation of the Onslow County

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ordinance. Maynor's appeal of that Order remains pending before this Court.

On 5 December 1995, the third prior action was filed by Onslow County against Mercer. In its complaint, Onslow County sought injunctive relief and an order of abatement commanding Mercer to comply with the provisions of the ordinance and to cease his operation of the subject adult businesses. In response, Mercer moved to dismiss or abate on grounds that his prior action against Onslow County was still pending in Federal District Court. Superior Court Judge Louis B. Meyer agreed with him and determined that Onslow County's motion for injunctive relief was not properly before the court.

The Present Actions

The present actions were brought in the Superior Court of Onslow County by the State of North Carolina against defendants Donald E. Mercer, Sr., Donald E. Mercer, Sr. d/b/a Don's Enterprises and Cynthia R. Maynor, owners and operators of a total of seven adult businesses in Onslow County which the State contends constitute public nuisances in violation of Chapter 19 of the North General Statutes.

At the hearing on this matter, defendants moved the trial court to dismiss the action on grounds of *res judicata* and collateral estoppel or to have it abated due to the prior pending action brought by Mercer against Onslow County. After hearing the arguments of both parties, the trial court denied defendants' Motion to Dismiss or Abate. From that order, defendants appeal.

DISCUSSION

I.

Plea in Abatement

[1] On appeal, defendants first contend that the trial court erred in denying their plea in abatement. They argue that the present actions should be abated because the operation of some, but not all, of the businesses at issue are also the subject of the prior pending actions to which they are parties—the action pending in the United States District Court for the Eastern District of North Carolina (*Mercer v. Onslow*), and the two other actions filed in the Superior Court Division of Onslow County (*Maynor v. Onslow* and *Onslow v. Mercer*). For the reasons set forth below, we disagree.

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When a prior action is pending between the same parties, affecting the same subject matter in a court within the state or the federal court having like jurisdiction, the subsequent action is wholly unnecessary and therefore, in the interest of judicial economy, should be subject to a plea in abatement. *Eways v. Governor's Island*, 326 N.C. 552, 560-61, 391 S.E.2d 182, 185 (1990) (citing *McDowell v. Blythe Brothers*, 236 N.C. 396, 72 S.E.2d 860 (1952); and *Cameron v. Cameron*, 235 N.C. 82, 68 S.E.2d 796 (1952)). "Moreover, where the prior action has been adjudicated by the trial court but is pending appeal it will continue to abate a subsequent action between the parties on substantially identical subject matter and issues." *Id.* In determining whether the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior actions, the ordinary test is this: "Do the two actions present a substantial identity as to parties, subject matter, issues involved and relief demanded." *Clark*, 326 N.C. at 21, 387 S.E.2d at 172 (quoting *Cameron*, 235 N.C. at 85, 68 S.E.2d at 798).

Based upon the foregoing principles, we conclude that the trial court properly denied defendants' plea in abatement. While there is substantial identity between the parties to the present actions and those in the prior pending actions, the same cannot be said as to the identity of the subject matter, issues involved, and relief demanded.

The present and prior pending actions differ as to subject matter because the present actions were brought under Chapter 19 of the North Carolina General Statutes and the prior actions were brought under an Onslow County ordinance regulating adult businesses. N.C.G.S. § 19-1, entitled "What Are Nuisances Under This Chapter," provides:

- (a) The erection, establishment, continuance, maintenance, use, ownership or leasing of any building or place for the purpose of assignation, prostitution, gambling, illegal possession or sale of alcoholic beverages, illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or illegal possession or sale of obscene or lewd matter, as defined in this Chapter, shall constitute a nuisance . . .

N.C.G.S. § 19-1.2 which sets forth the "types of nuisances" prohibited by N.C.G.S. § 19-19(a), provides in pertinent part:

- (6) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation . . . or prostitution, and

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every such place in or upon which acts of lewdness, assignation...or prostitution are held or occur.

Thus, to prevail in the present nuisance actions, the State will have to establish that some form of "lewdness, assignation or prostitution," occurred in defendants' establishments. See *Gilchrist v. Hurley*, 48 N.C. App. 433, 269 S.E.2d 646, cert. denied, 301 N.C. 720, 274 S.E.2d 233 (1981). In contrast, to establish a violation of the county ordinance, Onslow County need only show that certain specified anatomical areas were exhibited.

Moreover, maintenance of a public nuisance under Chapter 19 can be enjoined regardless of the proximity of the nuisance to other structures, while under the Onslow County ordinance, a public nuisance can be enjoined only if that business operates in a building located within 1,000 feet of a school, residence, church or other adult business. Thus, the prior pending actions and the present actions differ with regard to the location of the forbidden activity. We therefore conclude that the prior pending actions and the present actions present substantially different subject matters.

For essentially the same reasons, the present actions and the prior pending actions also differ as to the issues presented. Again, the prior federal and state actions involve defendants' challenge to the validity of the Onslow County ordinance, a question that will not arise in the present action involving defendants' alleged violations of Chapter 19 of the North Carolina General Statutes. Also, the prior action to which Maynor is a party involves only the business known as the "Doll House". In that same vein, only five of the eight businesses involved in the action brought by Mercer are at issue in the present action brought by the State. In short, the prior and present actions differ substantially as to both the laws being challenged and the issues to be resolved.

Finally, although injunctive relief is sought in all the actions involving defendants, the relief sought in the present actions is both more extensive than the relief sought in the prior actions. In the present actions, the State seeks injunctive relief, which if granted would prohibit defendants from operating a public nuisance anywhere within the State of North Carolina. In contrast, if granted, the injunctive relief sought in the prior pending actions would not extend beyond the borders of Onslow County, and would not prohibit the operation of a public nuisance unless the public was located within

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1,000 feet of a school, residence, church or other adult business. Further, in the present actions, the State seeks to recover from defendants the money they received from operating their businesses, while in the prior actions, such a remedy is not available under the Onslow County ordinance.

In sum, we hold that the trial court properly determined that the prior actions pending against defendants did not abate the actions presently being brought against them. We, therefore, find no merit to this assignment of error.

II.

Res Judicata and Collateral Estoppel

Next, defendants contend that the trial court erred in denying their motion to dismiss or abate based upon the theories of *res judicata* and collateral estoppel. They argue that under the theory of *res judicata*, the dismissal with prejudice of Onslow County's counter-claim in the prior federal action bars the State from bringing the present actions. In addition, defendants contend that the doctrine of collateral estoppel also bars the State from bringing the present actions because, they argue, the issues raised in the present actions could have been raised in the prior Maynor action. We find no merit in either of defendants' arguments.

[2] To successfully assert the doctrine of *res judicata*, a party must prove the following essential elements: (1) a final judgment on the merits rendered in an earlier suit; (2) an identity of causes of action in both the earlier and later suit and; (3) an identity of the parties or their privies in the two suits. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985). Collateral estoppel, on the other hand, is successfully asserted when a party can show that those matters actually at issue in the later suit were the same ones which were at issue in the earlier suit and were the same matters upon which the determination in the earlier action were based. *In re Wilkerson*, 57 N.C. App. 63, 291 S.E.2d 182 (1982).

As to defendants' claim that the theory of *res judicata* precludes the State from bringing the present actions against defendants, the above principles dictate the opposite conclusion. First, there is no identity of causes of action between the prior federal action and the present ones. In the present actions, the State brings its cause of action under Chapter 19 of the North Carolina General Statutes, while in the prior federal action, the liability of defendants

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is contingent upon the validity and enforcement of the Onslow County ordinance.

Furthermore, despite the dismissal of the prior federal action with prejudice, there was no “final judgment on the merits” in the prior federal action which would preclude the present actions from being brought. In *Shoup v. Bell & Howell Co.*, 872 F.2d 1178 (4th Cir. 1989), our Federal Circuit Court of Appeals held that the dismissal of a claim for lack of subject matter jurisdiction does not serve to preclude a later claim from being brought against a particular party. In this case, the Federal District Court concluded that Onslow County’s counterclaim against Mercer was subject to dismissal with prejudice because Onslow County’s counterclaim “did not present a separate ‘case or controversy,’ and thus did not present the Court with any issues for judgment.” There being no “case or controversy” by which subject matter jurisdiction could have been properly conferred upon the federal court, we must conclude that the dismissal of the prior federal action does not serve to bar the State from bringing the present actions against defendants.

[3] As to defendants’ claim that the State is barred by the doctrine of collateral estoppel from bringing the present actions against defendants, we find it significant that under Chapter 19, Onslow County was not permitted to prosecute a nuisance action in the name of the State until 1 December 1995, more than a year after Onslow County filed its counterclaim against defendants on 18 November 1994. See N.C. Gen. Stat. § 19-2.1 (1991). Consequently, Onslow County could not have brought an action to abate a public nuisance at the time the Maynor action was commenced. Given these circumstances, and the fact that the State action to which defendant Maynor is a party involves the validity of the Onslow County nuisance ordinance as it relates to the business known as the “Doll House,” while in the present actions, the subject matter concerns the propriety, under Chapter 19, of seven other businesses not parties to the Maynor action, we hold that the State is not barred by the doctrine of collateral estoppel from asserting issues in the present actions not raised in the prior Maynor action.

In conclusion, the order of the trial court is,

Affirmed.

Judges EAGLES and MARTIN, Mark D., concur.

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[128 N.C. App. 379 (1998)]

COASTAL LEASING CORPORATION, PLAINTIFF v. T-BAR S CORPORATION D/B/A WESTERN SIZZLIN AND GEORGE TERRANCE TALBOTT AND SHARON T. TALBOTT, DEFENDANTS

No. COA97-382

(Filed 20 January 1998)

1. Bailment § 1 (NCI4th)— cash register lease—governing statute

The lease of cash register equipment was governed by N.C.G.S. § 25-2A-103 since both parties agreed that the transaction was a lease and, by its terms, N.C.G.S. § 25-2A applies to any transaction, regardless of form, that creates a lease.

2. Damages § 59 (NCI4th)— cash register lease—liquidated damages—enforceable

The trial court did not err by granting summary judgment for plaintiffs on the issue of enforcing a liquidated damages clause in a cash register lease where plaintiff did not exercise a superior bargaining position in the negotiation of the clause and the clause placed plaintiff in the position it would have occupied had the lease been fully performed by allowing it to accelerate the balance of the lease payments and repossess the equipment.

3. Secured Transactions § 8 (NCI4th)— leased cash registers—default—accelerated balance—repossession—sale to owner—re-lease—calculation of credit

The trial court erred by granting summary judgment for plaintiffs on the issue of the commercial reasonableness of the sale of leased cash register equipment following defendants' default where plaintiffs, the lessors, purchased the equipment, re-leased some of it, and sought to recover the accelerated balance under the original lease minus the net proceeds of the sale. Commercial reasonableness was not addressed and the matter was remanded for a calculation of defendants' credit under the liquidated damages clause of the lease because plaintiffs retained title to the equipment at all relevant times. The sale was not a "sale" within the meaning of the liquidated damages clause.

Appeal by defendants from judgment entered 8 January 1997 by Judge Michael R. Morgan in Wake County District Court. Heard in the Court of Appeals 29 October 1997.

IN THE COURT OF APPEALS
COASTAL LEASING CORP. v. T-BAR CORP.

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Smith Debnam Hibbert, L.L.P., by Caren D. Enloe, for plaintiff-appellee.

Higgins, Frankstone, Graves & Morris, P.A., by David J. Hart, for defendants-appellants.

WALKER, Judge.

Plaintiff entered into a lease agreement (lease) with defendant T-Bar S Corporation (T-Bar) in May of 1992, whereby plaintiff agreed to lease certain cash register equipment (equipment) to T-Bar. Under the lease, T-Bar agreed to monthly rental payments of \$289.13 each for a total of 48 months. Defendants George and Sharon Talbott (appellants) were the officers of T-Bar and personally guaranteed payment of all amounts due under the lease.

After making 18 of the monthly payments, appellants and T-Bar defaulted on the lease in December of 1993. On 28 February 1994, plaintiff mailed a certified letter to appellants and T-Bar, return receipt requested, advising them that the lease was in default and, pursuant to the terms of the lease, plaintiff was accelerating the remaining payments due under the lease. They further advised appellants and T-Bar that if the entire amount due of \$8,841.06 was not received within 7 days, plaintiff would seek to recover the balance due plus interest and reasonable attorneys' fees, as well as possession of the equipment. The record shows that appellants and T-Bar each received this letter on 1 March 1994.

On 10 March 1994, plaintiff mailed a certified letter and "Notice of Public Sale of Repossessed Leased Equipment" (notice of sale) to appellants and T-Bar at the same address, again return receipt requested. This letter advised appellants and T-Bar that plaintiff had taken possession of the equipment and was conducting a public sale pursuant to the terms of the lease. Although the date on the notice of sale stated that the sale was to be held on 23 March 1994, the sale was actually scheduled to be held on 25 March 1994. This letter and notice of sale were returned to plaintiffs "unclaimed" on 29 March 1994.

Plaintiffs conducted a public sale of the equipment on 25 March 1994 and no one appeared on behalf of appellants or T-Bar. There being no other bidders, plaintiff purchased the equipment at the sale for \$2,000.00.

On 4 October 1994, plaintiff leased some of the same equipment to another company at a rate calculated to be \$212.67 for 36 months. Plaintiff then filed this action on 6 October 1994 seeking to recover

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the balance due under the lease, minus the net proceeds from the 25 March 1994 public sale, plus interest and reasonable attorneys' fees. Appellants filed an answer and counterclaim on 27 July 1995. Plaintiff then filed a motion for summary judgment against appellants on 8 July 1996. When T-Bar failed to answer, a default judgment was entered against it on 30 December 1996.

After a hearing, the trial court entered summary judgment on 15 January 1997 in favor of plaintiff on its complaint and appellants' counterclaims and entered judgment against appellants for the sum of \$7,223.56 plus interest and attorneys' fees of \$1,083.54.

At the outset, we first note that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Pressman v. UNC-Charlotte*, 78 N.C. App. 296, 300, 337 S.E.2d 644, 647 (1985), *disc. review allowed*, 315 N.C. 589, 341 S.E.2d 28 (1986).

Equipment leasing transactions are an ever increasing segment of commercial activity in North Carolina as well as in the rest of the United States. According to recent U.S. Department of Commerce statistics, "leasing transactions accounted for approximately \$168.9 billion of new equipment installed in 1996, an expansion of 11.6% over 1995." Stephen T. Whelan et al., *Leases*, 52 Bus. Law. 4, at 1517 (1997).

[1] A threshold issue in this case is whether the transaction involved is a lease or a security interest disguised as a lease. If it is a security interest disguised as a lease, it will be governed by N.C. Gen. Stat. § 25-9 (Article 9). However, if it is a lease, it will be governed by N.C. Gen. Stat. § 25-2A (Article 2A). See N.C. Gen. Stat. § 25-2A-103 cmt. j (1995).

By its terms, Article 2A "applies to any transaction, regardless of form, that creates a lease." N.C. Gen. Stat. § 25-2A-102 (1995). Further, a "lease" is defined as "a transfer of the right to possession and use of goods for a term in return for consideration, but a sale . . . is not a lease." N.C. Gen. Stat. § 25-2A-103(1)(j) (1995). In contrast, a transaction involves a security interest if it meets the general definition set forth in part 2 of Article 1. See N.C. Gen. Stat. § 25-1-201(37)(a) (1995). Since both parties agree that the transaction at issue in this case is not a security interest, but rather is a lease, Article 2A controls.

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Before addressing appellants' assignments of error, we should note that Article 2A did not become effective in this State until 1 October 1993. Therefore, there is an absence of case law interpreting this Article.

[2] In their appeal, appellants contend that the trial court erred by granting summary judgment in favor of plaintiff because there exists a genuine issue of material fact as to whether: (1) the liquidated damages clause contained in Paragraph 13 of the lease is reasonable in light of the then-anticipated harm caused by default; and (2) plaintiff conducted the sale of the equipment in a commercially reasonable manner.

As to appellants' first contention, the official commentary to Article 2A states that "in recognition of the diversity of the transactions to be governed [and] the sophistication of many of the parties to these transactions . . . , freedom of contract has been preserved." N.C. Gen. Stat. § 25-2A-102 Official Comment (1995). Also, under general contract principles, when the parties to a transaction deal with each other at arms length and without the exercise by one of the parties of superior bargaining power, the parties will be bound by their agreement. *See Suits v. Insurance Co.*, 249 N.C. 383, 386, 106 S.E.2d 579, 582 (1959).

Article 2A recognizes that "[m]any leasing transactions are predicated on the parties' ability to agree to an appropriate amount of damages or formula for damages in the event of default or other act or omission." N.C. Gen. Stat. § 25-2A-504 Official Comment (1995). N.C. Gen. Stat. § 25-2A-504 states, in pertinent part:

(1) Damages payable by either party for default, or any other act or omission . . . may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then-anticipated harm caused by the default or other act or omission.

N.C. Gen. Stat. § 25-2A-504(1) (1995). This liquidated damages provision is more flexible than that provided by its statutory analogue under Article 2, N.C. Gen. Stat. § 25-2-718. The Article 2 liquidated damages section provides, in pertinent part:

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, *the difficulties of proof of loss, and the inconvenience or nonfeasibility*

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of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

N.C. Gen. Stat. § 25-2-718(1) (1995) (emphasis added). A review of these statutes reveals two major differences.

First, the drafters of Article 2A chose not to incorporate the two tests which are required by Article 2, i.e., the difficulties of proof of loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. In fact, the official commentary to N.C. Gen. Stat. § 25-2A-504 states that since “[t]he ability to liquidate damages is critical to modern leasing practice . . . [and] given the parties’ freedom to contract at common law, the policy behind retaining these two additional requirements here was thought to be outweighed.” N.C. Gen. Stat. § 25-2A-504 Official Comment (1995).

Secondly, the drafters of Article 2A recognized that in order to further promote freedom of contract, it was necessary to delete the last sentence of N.C. Gen. Stat. § 25-2-718(1), which provided that unreasonably large liquidated damages provisions were void as a penalty. As such, the parties to a lease transaction are free to negotiate the amount of liquidated damages, restrained only by the rule of reasonableness.

“The basic test of the reasonableness of an agreement liquidating damages is whether the stipulated amount or amount produced by the stipulated formula represents a reasonable forecast of the probable loss.” 3A Hawkland and Miller, *Uniform Commercial Code Series* § 2A-504:02 (1993). However, “no court should strike down a reasonable liquidated damage agreement based on foresight that has proved on hindsight to have contained an inaccurate estimation of the probable loss. . . .” *Id.* And, “the fact that there is a difference between the actual loss, as determined at or about the time of the default, and the anticipated loss or stipulated amount or formula, as stipulated at the time the lease contract was entered into . . . ,” does not necessarily mean that the liquidated damage agreement is unreasonable. *Id.* This is so because “[t]he value of a lessor’s interest in leased equipment depends upon ‘the physical condition of the equipment and the market conditions at that time.’” *Pacificorp Capital, Inc. v. Tano, Inc.*, 877 F. Supp. 180, 184 (S.D.N.Y. 1995) (citation omitted). Further, in determining whether a liquidated damages clause is reasonable:

[A] court should keep in mind that the clause was negotiated by the parties, who are familiar with the circumstances and prac-

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tices with respect to the type of transaction involved, and the clause carries with it a consensual apportionment of the risks of the agreement that a court should be slow to overturn.

Hawkland and Miller, supra, at § 2A-504:02.

In this case, Paragraph 13 of the lease (the liquidated damages clause) reads as follows:

13. REMEDIES. If an event of default shall occur, Lessor may, at its option, at any time (a) declare the entire amount of unpaid rental for the balance of the term of this lease immediately due and payable, whereupon Lessee shall become obligated to pay to Lessor forthwith the total amount of the said rental for the balance of the said term, and (b) without demand or legal process, enter into the premises where the equipment may be found and take possession of and remove the Equipment, without liability for suit, action or other proceeding, and all rights of Lessee in the Equipment so removed shall terminate absolutely. Lessee hereby waives notice of, or hearing with respect to, such retaking. Lessor may at its option, use, ship, store, repair or lease all Equipment so removed and sell or otherwise dispose of any such Equipment at a private or public sale. In the event Lessor takes possession of the Equipment, Lessor shall give Lessee credit for any sums received by Lessor from the sale or rental of the Equipment after deduction of the expenses of sale or rental and Lessor's residual interest in the Equipment. . . . Lessor and Lessee acknowledge the difficulty in establishing a value for the unexpired lease term and owing to such difficulty agree that the provisions of this paragraph represent an agreed measure of damages and are not to be deemed a forfeiture or penalty. . . .

All remedies of Lessor hereunder are cumulative, are in addition to any other remedies provided for by law, and may, to the extent permitted by law, be exercised concurrently or separately. The exercise of any one remedy shall not be deemed to be an election of such remedy or to preclude the exercise of any other remedy. No failure on the part of the Lessor to exercise and no delay in exercising any right or remedy shall operate as a waiver thereof or modify the terms of this lease.

After a careful review, we conclude the liquidated damages clause is a reasonable estimation of the then-anticipated damages in the event of default because it protects plaintiff's expectation inter-

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est. The liquidated damages clause places plaintiff in the position it would have occupied had the lease been fully performed by allowing it to accelerate the balance of the lease payments and repossess the equipment. Therefore, since there is no evidence that plaintiff exercised a superior bargaining position in the negotiation of the liquidated damages clause, no genuine issue of material fact exists as to its reasonableness, and the trial court did not err by enforcing its provisions.

[3] Appellants next contend that the trial court erred by granting summary judgment for plaintiff because a genuine issue of material fact existed as to whether plaintiff conducted the sale of the equipment in an appropriate manner. Although they concede that plaintiff had the authority under N.C. Gen. Stat. § 25-2A-527(1) (1995), as well as under the lease, to dispose of the equipment by resale, appellants argue that plaintiff did not conduct the sale in a “commercially reasonable manner.”

However, for the reasons discussed below, we find that the 25 March 1994 sale of the equipment was not a “sale” within the meaning of the lease, and we therefore decline to address the issue of commercial reasonableness.

Article 2 defines a “sale” as consisting of “the passing of title from the seller to the buyer for a price.” N.C. Gen. Stat. § 25-2-106(1) (1995). In this case, we note that since the transaction involves a lease, and not a security interest, title to the equipment was never transferred to appellants or T-Bar, but remained with plaintiff at all times. *See* N.C. Gen. Stat. § 25-2A-302 (1995). The lease specifically provides that plaintiff retained title to the equipment. Section 6 of the lease states, in pertinent part, “[n]o title or right in said equipment shall pass to Lessee except the rights herein expressly granted.” Further, Section 18 of the lease provides that “the title to the equipment subject to this Lease is retained by the Lessor and the Lessee covenants that it will not pledge or encumber the equipment in any manner whatsoever. . . .”

Therefore, since plaintiff retained title to the equipment at all relevant times, the portion of the liquidated damages clause which allowed plaintiff, upon default, to repossess the equipment and then “sell or otherwise dispose of any such equipment at a public or private sale” must reasonably be interpreted as providing plaintiff with the right to sell or release the equipment to the appellants or another third party, not to itself. A contrary conclusion would permit a lessor

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to "purchase" repossessed equipment, even though it never relinquished title, at a price not necessarily related to its market value. The lessor could then release the equipment to another party, crediting the defaulting lessee only for the amount realized from the purported sale. Accordingly, the trial court erred by treating the 25 March 1994 sale as a "sale" under the terms of the liquidated damages clause and calculating the amount of appellants' credit based on such purported sale.

In conclusion, we affirm the trial court's determination that the liquidated damages clause in the lease is enforceable against the appellants. However, we reverse and remand the case for a determination of how much credit, if any, the appellants are entitled to receive under the terms of the liquidated damages clause.

Affirmed in part, reversed in part and remanded.

Judges LEWIS and TIMMONS-GOODSON concur.

TOHATO, INC., (FORMERLY TOHATO SEIKA CO., LTD.), A JAPANESE CORPORATION,
PLAINTIFF v. PINEWILD MANAGEMENT, INC., A VIRGINIA CORPORATION, AND COUN-
TRY CLUB OF PINEWILD MANAGEMENT, INC., A NORTH CAROLINA CORPORATION,
DEFENDANTS v. CLUBCORP REALTY HOLDINGS, INC., ON BEHALF OF ITSELF,
INDIVIDUALLY AND ON BEHALF OF PINEWILD REALTY MASTER JOINT VENTURE, INTERVENING
DEFENDANT

No. COA97-550

(Filed 20 January 1998)

**1. Appeal and Error § 443 (NCI4th)— motion to dismiss—
intent to appeal—not in notice**

The denial of defendants' motions to dismiss was not before the appellate court since defendants failed to specify their intent to appeal that part of the trial court's order in their respective notices.

**2. Arbitration and Award § 24 (NCI4th)— limited partner-
ship agreement—arbitration clause—inapplicability to dis-
puted issues**

Under Texas law, a limited partner's derivative action seeking to terminate service contracts entered on behalf of the limited partnership did not come within the arbitration clause in the lim-

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ited partnership agreement where the arbitration clause permits arbitration when the management committee deadlocks and the failure of the management committee renders the operation of the partnership impracticable, and even if there is a deadlock in the management committee, there is no evidence that the failure of the committee to act has rendered the continued operation of the partnership impracticable in that the partnership has continued to operate since this action was filed and is expected to continue to operate into the foreseeable future.

3. Partnership § 22 (NCI4th)— limited partner—authorization of derivative suits

A limited partnership agreement's specific authorization of derivative suits by the limited partner controlled over the general requirement in the agreement for management committee approval for litigation.

4. Arbitration and Award § 14 (NCI4th)— right to arbitration—burden of proof

A party to a contract who seeks to compel arbitration under Texas law must first establish his right to that remedy under the contract.

Appeal by defendants and intervening defendant from order entered 24 March 1997 by Judge W. Douglas Albright in Moore County Superior Court. Heard in the Court of Appeals 20 November 1997.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by H. Gerald Beaver, Mark A. Sternlicht, and Jessica S. Cook, for plaintiff appellee.

Womble Carlyle Sandridge & Rice, PLLC, by S. Fraley Bost, for ClubCorp Realty Holdings, Inc., intervening defendant appellant.

Van Camp, Hayes & Meacham, P.A., by James R. Van Camp and Michael J. Newman; and Brown, McCarroll & Oakes Hartline, by Jackson D. Wilson, II, for Pinewild Management, Inc., and Country Club of Pinewild Management, Inc., defendant appellants.

SMITH, Judge.

This appeal involves the enforceability of an arbitration clause found in an agreement governed by Texas law. On 20 February 1990,

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ClubCorp Realty Holdings, Inc. ("ClubCorp"), a Texas corporation, entered into a Master Joint Venture Agreement with Lieben USA Corporation ("Lieben"), a California corporation. ClubCorp was designated as the Managing General Partner of the joint venture, and Lieben was designated as a General Partner. The purpose of the joint venture was to locate, acquire, develop and manage private golf country clubs.

Section 2.5 of the joint venture agreement provided that upon location of suitable property, the joint venture would purchase such property and form a limited partnership to manage its development. In 1990, ClubCorp purchased a property known as Pinewild in Moore County, North Carolina. Upon purchasing Pinewild, the joint venture formed the Pinewild Project Limited Partnership ("PPLP") with Tohato Seika Co., Ltd., a Japanese corporation, now known as Tohato, Inc. ("Tohato"), pursuant to the PPLP Agreement. This agreement designated the Master Joint Venture as the General Partner of the PPLP and Tohato as the Limited Partner of the PPLP. Article 6 of the PPLP Agreement provided that the operations and major policy decisions of the PPLP would be controlled by ClubCorp through a Management Committee comprised of six members, with three members representing ClubCorp and three members representing Tohato. Section 6.3 of the agreement stated that each member of the committee would have one vote, and resolutions of the committee would be approved only upon a majority vote.

On 25 October 1991, the original Master Joint Venture Agreement between ClubCorp and Lieben was amended. Pursuant to this amendment, Tohato Realty USA, Inc., a subsidiary of Tohato, purchased Lieben's interest in the joint venture and was substituted in place of Lieben as General Partner. The name of the joint venture was then changed to Pinewild Realty Master Joint Venture.

In section 6.10 of the PPLP Agreement, Tohato acknowledged that ClubCorp would contract with various ClubCorp affiliates on behalf of the PPLP to perform real estate and club development services at Pinewild. ClubCorp therefore contracted with Pinewild Management, Inc. ("PMI") for overall property development and Country Club of Pinewild Management, Inc. ("CCPMI"), for development and operation of the country club. In the spring of 1996, a dispute arose between ClubCorp and Tohato regarding the operation of Pinewild. Thereafter, Tohato filed a derivative action on behalf of the PPLP against PMI and CCPMI seeking to terminate the PPLP's con-

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tracts with them. Tohato filed this action pursuant to section 6.9.6 of the PPLP Agreement, which authorized Tohato to “[t]ake any action required or permitted by law to bring or pursue a derivative action in the right of the Partnership.”

On 21 June 1996, PMI and CCPMI filed a motion to compel arbitration and dismiss Tohato’s complaint. ClubCorp, individually and on behalf of the joint venture, moved to intervene in this case and filed a separate motion to compel arbitration and a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990). In these motions, the three defendants contended that the dispute between ClubCorp and Tohato had resulted in a deadlock within the PPLP’s management committee and that Tohato was therefore required by the terms of the PPLP Agreement to proceed pursuant to the dispute resolution mechanism set forth in section 14.4.1 of the agreement. This section states that:

In the event of a deadlock on the Management Committee, and the failure of the Management Committee to act renders the continued operation of the Partnership impracticable, the senior officers of the corporate partners of General Partner and Limited Partner shall meet to resolve the differences. If no resolution occurs within thirty (30) days after such meeting, General Partner and Limited Partner shall each be entitled to submit the matter to arbitration in accordance with the provisions of Article 18; provided that any such arbitration shall be nonbinding. If either Partner rejects the results of the arbitration, such Partner shall be entitled to give a notice (a “Buy/Sell Notice”) to the other Partner that it desires to exercise its rights under this Section 14.4 to sell its interest in the Partnership to, or purchase the interest in the Partnership of, the other Partner.

The trial court allowed ClubCorp’s motion to intervene, but denied defendants’ motions to dismiss and compel arbitration. In denying these motions, the trial court found that the provisions of the PPLP Agreement did not encompass the issues disputed by the parties, that the continued operation of the PPLP had not been rendered impracticable, and that defendants failed to demonstrate the existence of grounds to compel arbitration.

[1] On appeal, defendants contend the trial court erred by failing to enforce the arbitration clause found in section 14.4.1 of the PPLP Agreement. However, the denial of defendants’ motions to dismiss is not before us since defendants failed to specify their intent to appeal

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that part of the trial court's order in their respective notices of appeal. *See Smith v. Independent Life Ins. Co.*, 43 N.C. App. 269, 272, 258 S.E.2d 864, 866 (1979) ("the appellant must appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider in order for the appellate court to be vested with jurisdiction to determine such matters.")

Section 19.9 of the PPLP Agreement provides that "[t]his Agreement shall be governed by and construed under the laws of the State of Texas." Texas courts have held that "[w]here the parties to a contract specify in the instrument that it is to be governed by the law of a particular state, that law will apply if it has a reasonable relationship to the contract." *Securities Investment Co. v. Finance Accept. Corp.*, 474 S.W.2d 261, 271 (Tex. Civ. App. 1971). Our Supreme Court has likewise held that "where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect." *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). We therefore apply Texas law in determining the enforceability of the PPLP Agreement's arbitration clause.

We initially observe that both parties discuss the issue of PMI's and CCPMI's status as third-party beneficiaries to the PPLP Agreement. However, the trial court did not rule on this issue, and the assignments of error PMI and CCPMI cite with respect to this issue do not relate to their status as third-party beneficiaries. "The appellate court will not consider arguments based upon issues which were not presented or adjudicated by the trial tribunal. Further, the lack of an exception or assignment of error addressed to the issue attempted to be raised is a fatal defect." *State v. Smith*, 50 N.C. App. 188, 190, 272 S.E.2d 621, 623 (1980) (citations omitted); N.C.R. App. P. 10(a). Thus, we do not address the issue of PMI's and CCPMI's status as third-party beneficiaries to the PPLP Agreement.

[2] Under Texas law, a written agreement to arbitrate is valid and enforceable if the agreement is to arbitrate a controversy that either exists at the time of the agreement or arises between the parties after the date of the agreement. Tex. Civ. Prac. & Rem. Code Ann. § 171.001 (Vernon Supp. 1996). N.C. Gen. Stat. § 1-567.2 (1996) similarly provides that parties may agree in writing to submit to arbitration any controversy existing at the time of the agreement or arising thereafter. When ruling on a motion to compel arbitration, the trial court "must determine whether the parties agreed to arbitrate, and, if so, the scope of the arbitration agreement." *Southwest Health Plan, Inc.*

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v. *Sparkman*, 921 S.W.2d 355, 358 (Tex. Ct. App. 1996). In the case at bar, Tohato does not dispute the existence or validity of the PPLP Agreement's arbitration clause. Thus, the issue we must determine is whether the arbitration clause encompasses the parties' dispute.

"The courts of Texas view arbitration agreements with favor and have done so since at least 1845." *American Employers' Ins. Co. v. Aiken*, 942 S.W.2d 156, 161 (Tex. Ct. App. 1997). Further,

any doubt as to whether a particular claim falls within the scope of an arbitration clause is resolved in favor of arbitration. In other words, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

United Parcel Service, Inc. v. McFall, 940 S.W.2d 716, 719 (Tex. Ct. App. 1997) (citations omitted). North Carolina likewise "has a strong public policy favoring the settlement of disputes by arbitration." *Johnston County v. R. N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992).

The determination of whether an agreement imposes a duty to arbitrate a particular dispute "is a matter of contract interpretation and a question of law for the court." *American Employers' Ins. Co.*, 942 S.W.2d at 159. Here, the trial court, in its order, found as fact that the arbitration clause did not encompass the parties' dispute. However, this statement is a conclusion of law rather than a finding of fact, since such determination involves the interpretation and construction of the arbitration clause. "The legal conclusions of the trial court are always reviewable de novo by the appellate court." *General Dynamics v. Torres*, 915 S.W.2d 45, 48 (Tex. Ct. App. 1995).

Tohato claims "[t]he proper standard of review on appeal from an interlocutory order concerning a motion to stay litigation and compel arbitration is the 'no evidence' standard of review." *Carlin v. 3V Inc.*, 928 S.W.2d 291, 293 (Tex. Ct. App. 1996) (citation omitted). Under this standard,

the court considers only the evidence and inferences, when viewed in their most favorable light, that tend to support the finding under attack, and disregards all evidence and inferences to the contrary. If there is any evidence of probative force to support the finding, the point must be overruled and the finding upheld.

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Id. However, we do not believe this standard should be applied in the instant case, since it “is the appropriate standard when reviewing factual questions concerning an order denying arbitration” *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 820 (Tex. Ct. App. 1996). In the instant case, we are required to interpret contract provisions and make legal conclusions; we are not required to weigh conflicting evidence and make factual determinations. Thus, we review the conclusions of the trial court *de novo*.

After reviewing the record, we conclude the trial court properly held that the PPLP Agreement’s arbitration clause does not encompass the present dispute. The clause provides that a dispute will be submitted to arbitration when four conditions are met: (1) the Management Committee is deadlocked; (2) the Management Committee’s failure to act renders the continued operation of the partnership impracticable; (3) the senior officers of the corporate partners have met and attempted to resolve the deadlock; and (4) the deadlock is not resolved within 30 days after the senior officers’ meeting. Defendants claim Tohato conceded a deadlock exists and that the arbitration clause encompasses the present dispute by stating in its complaint that “[a] majority vote is required for bringing litigation. The Plaintiff therefore reasonably believes that requesting the Partnership to bring an action against the Defendants would be futile.” Tohato argues this allegation merely sets out its belief that requesting the PPLP through the Management Committee to bring an action against PMI and CCPMI would be futile, and is not a concession that a deadlock exists among the committee members. Even assuming a deadlock exists, there is no evidence in the record that the failure of the Management Committee to act has rendered the continued operation of the partnership impracticable. The record demonstrates the partnership has continued to operate since this action was filed, and is expected to continue to operate into the foreseeable future. Thus, because the present dispute does not meet the conditions set forth in the arbitration clause, the trial court properly concluded the dispute was not required to be submitted to arbitration.

[3] Defendants further argue that Tohato conceded in its complaint that derivative actions must first be approved by the Management Committee by alleging that “a majority vote is required for bringing litigation.” However, because Tohato immediately thereafter alleged “[t]he Plaintiff therefore reasonably believes that requesting the Partnership to bring an action against the Defendants would be

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futile," we believe the allegation concerning a majority vote refers to section 6.5.14 of the PPLP Agreement, which requires Management Committee approval when the General Partner, ClubCorp, desires to commence litigation. Section 6.9.6 of the PPLP Agreement clearly states that Tohato, as Limited Partner, may "[t]ake any action required or permitted by law to bring or pursue a derivative action in the right of the Partnership," and does not mention the necessity of Management Committee approval for bringing such an action. "It is a well established rule of construction that the specific language of an instrument controls over its general terms." *O'Connor v. O'Connor*, 694 S.W.2d 152, 155 (Tex. Ct. App. 1985). Thus, the specific authorization of derivative suits found in section 6.9.6 of the PPLP Agreement controls the general requirement of Management Committee approval for litigation brought by ClubCorp in section 6.5.14 and permits Tohato to institute the present action without approval by the Management Committee.

[4] Finally, defendants argue that the trial court improperly placed the burden of proof on them by stating in its order that they "failed to demonstrate that grounds exist to compel arbitration." Defendants claim the party opposing the enforcement of an arbitration clause has the burden of establishing that its claim is not referable to arbitration. However, "'[w]hen a party seeks to compel arbitration, he must first establish his right to that remedy under the contract.'" *Weekley Homes, Inc. v. Jennings*, 936 S.W.2d 16, 18 (Tex. Ct. App. 1996) (citation omitted). Since defendants have not shown that the arbitration clause encompasses the present dispute, the trial court properly concluded that defendants failed to demonstrate the existence of grounds to compel arbitration.

For the above reasons, we conclude the trial court properly denied defendants' motion to compel arbitration.

Affirmed.

Judges MARTIN, John C., and JOHN concur.

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STATE OF NORTH CAROLINA v. WILLIAM JUAN TAYLOR

No. COA96-1195

(Filed 20 January 1998)

1. Constitutional Law § 165 (NCI4th)—second-degree rape—prior 1993 delinquency adjudication for rape—use as aggravating factor—no *ex post facto* violation

The trial court did not violate the *ex post facto* clauses of the state or federal constitutions when sentencing defendant as an adult for second-degree rape by considering defendant's previous adjudication of delinquency based on another second-degree rape in 1993, even though the current statute was not in effect in 1993. The new sentencing statute does not retroactively punish conduct that was innocent when done in that the 1993 conduct was indisputably proscribed at that time, and does not aggravate the 1993 delinquency adjudication or inflict a greater punishment for that conduct than allowed at that time. The question of the level assigned to the delinquency adjudication was not raised at trial.

2. Constitutional Law § 161 (NCI4th)—second-degree rape—prior delinquency adjudication—aggravating factor—current sentencing law not in effect at prior adjudication—no due process violation

Due process principles were not violated by the consideration of a prior adjudication of delinquency based on rape when sentencing defendant as a adult for another second-degree rape even though the current sentencing law was not in effect at the prior adjudication. The sentencing statute was in effect at the time of this offense and defendant had notice that punishment for this crime was subject to aggravation by virtue of the delinquency adjudication. Furthermore, although defendant contends that the defense strategy would have been more adversarial in 1993 had his counsel known that an adjudication could follow defendant into adult court, defendant was afforded the full benefits of the adversarial system in the 1993 adjudication.

3. Appeal and Error § 155 (NCI4th)—second-degree rape—prior delinquency adjudication as aggravating factor—judicial estoppel—issue not preserved

A second-degree rape defendant being tried as an adult did not properly preserve his argument that the doctrine of judicial

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estoppel precluded the State from considering a prior adjudication of delinquency as an aggravating factor where the assistant district attorney at the transfer hearing took the position that the adjudication could not be used but a different assistant district attorney utilized the adjudication at trial. The record references cited by defendant do not reflect an affirmative request for a ruling on the applicability of the doctrine and plain error analysis is precluded because the doctrine is invoked in the court's discretion.

4. Evidence and Witnesses §§ 1246, 1343 (NCI4th)—second-degree rape—confession—voir dire hearing—constitutional rights—waiver

The trial court did not err in the second-degree rape prosecution of a juvenile as an adult by admitting defendant's confession into evidence where the court held a *voir dire*, found that defendant was fully advised of his rights, understood the warnings given to him, the nature of his rights, and the consequence of waiving those rights, and concluded that defendant knowingly, understandingly, and willingly waived his constitutional and statutory rights. While other states require that the state establish that a juvenile was advised of the possibility of being tried as an adult, no such requirement has been established in North Carolina. N.C.G.S. § 7A-595.

5. Infants or Minors § 99 (NCI4th)—juvenile transfer statute—not unconstitutionally vague

The juvenile transfer statute, N.C.G.S. § 7A-610(a), is not unconstitutionally vague.

Appeal by defendant from judgment entered 19 April 1996 by Judge John M. Gardner in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 June 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth R. Bare, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Janine Crawley Fodor, for Defendant.

JOHN, Judge.

Defendant appeals the trial court's judgment entered upon a jury verdict of guilty of second-degree rape. Defendant argues the court

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erred by using his prior delinquency adjudication as an aggravating sentencing factor and by admitting defendant's confession into evidence. Defendant further maintains the juvenile court's decision to transfer his case to the superior court for trial must be vacated. We conclude defendant's contentions are unavailing.

Relevant facts and procedural history are as follows: Defendant was thirteen years old at the time of the instant alleged offense. A delinquency petition charging defendant committed second-degree rape was filed in Mecklenburg County Juvenile Court 20 March 1995. Following a probable cause hearing conducted 10 May 1995, the State moved to transfer jurisdiction to the superior court. The motion was granted 25 May 1995.

Defendant was indicted 27 November 1995 on one count of second-degree rape and one count of first-degree kidnapping. At the conclusion of trial on 11 April 1996, defendant was acquitted of the latter offense, but convicted of the former.

Judgment and commitment were rendered 19 April 1996. The trial court found as an aggravating factor that "[t]he defendant ha[d] previously been adjudicated delinquent for an offense that would be a Class C felony if committed by an adult." The reference was to a 1993 adjudication based upon second-degree rape. The court found as a single mitigating factor that "defendant cooperated with police." After concluding "the factors in aggravation outweigh the factors in mitigation," the court sentenced defendant in the aggravated range to a minimum term of 79 months and a maximum term of 104 months imprisonment. Defendant filed timely notice of appeal.

I.

[1] We first consider defendant's arguments addressing the trial court's reliance upon defendant's prior delinquency adjudication as an aggravating sentencing factor. Defendant asserts three grounds upon which his contention of error by the trial court in this regard is based: (A) violation of the prohibition against *ex post facto* laws contained in our state and federal constitutions, (B) violation of constitutional provisions guaranteeing due process of law, and (C) judicial estoppel.

The applicable sentencing statute, N.C.G.S. § 15A-1340.16(d)(18a) (Supp. 1996) (the statute), permits the trial court to consider as a factor in aggravation of sentencing that

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[t]he defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.

A.

In his first constitutional argument, defendant points out that the statute was not in effect at the time of the 1993 juvenile adjudication for second-degree rape utilized in aggravating defendant's sentence. Defendant maintains the statute thereby in essence criminalizes juvenile acts of delinquency which were not treated as criminal acts at the time they were committed. Accordingly, defendant concludes, consideration of a delinquency adjudication occurring prior to enactment of the statute violated the *ex post facto* clauses of N.C. Const. Art. I, § 16 and Art. I, § 10 of the Federal Constitution. We do not agree.

In that the referenced provisions of the federal and state constitutions are based upon the same definition, *see State v. Robinson*, 335 N.C. 146, 147-48, 436 S.E.2d 125, 126-27 (1993), we analyze defendant's contentions thereunder jointly. The prohibition against enactment of *ex post facto* laws applies to

1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal rules of evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

Collins v. Youngblood, 497 U.S. 37, 42, 111 L. Ed. 2d 30, 38-9 (1990) (quoting *Calder v. Bull*, 3 Dall. 386, 390 (1798)).

The challenged statute permits the sentencing court to consider certain prior adjudications of delinquency as an aggravating factor. However, the statute does not criminalize defendant's 1993 delinquent conduct which indisputably was proscribed at the time it occurred. The new law thus does not retroactively punish conduct that was innocent when done. Nor does the statute aggravate the 1993 delinquency adjudication or inflict a greater punishment for that conduct than the law allowed at the time it was committed.

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Indeed, the only crime in actuality subject to *ex post facto* analysis is the second-degree rape of 19 March 1995. The statute became effective 1 October 1994 and was in effect 19 March 1995. The statute neither aggravates second-degree rape nor makes the punishment greater than it was on 19 March 1995. Further, the statute does not inflict a greater punishment than the law annexed to the crime on 19 March 1995.

Defendant further argues that the trial court, in considering aggravating factors, incorrectly considered his prior delinquency adjudication as a Class C felony rather than a Class D felony. At trial, defendant objected to use of his prior delinquency adjudication as an aggravating factor, but did not object to the level assigned to his delinquency adjudication. Defendant's failure to timely object at trial to the level assigned resulted in waiver of the issue. *See N.C.R. App. P. 10(b)(1)* ("to preserve a question for appellate review, a party must have presented to the trial court a timely . . . objection . . . stating the *specific* grounds for the ruling the party desired the court to make . . .") (*emphasis added*); *State v. Gardner*, 315 N.C. 444, 447, 340 S.E.2d 701, 704-05 (1986) ("a party may not, after trial and judgment, comb through the transcript of the proceedings and randomly insert an exception notation in disregard of the mandates of N.C. R. App. P. 10(b)"). In addition, defendant has failed to

alert [this Court] that no action was taken by counsel at trial and then establish his right to review by asserting the manner in which the exception was preserved or how the error may be noticed although not brought to the attention of the trial court.

Gardner, 315 N.C. at 447-48, 340 S.E.2d at 705. We therefore do not address the merits of this contention on appeal.

Based on the foregoing, we hold defendant's first constitutional argument, *i.e.*, that use of an adjudication of juvenile delinquency as an aggravating factor in sentencing an adult defendant violates the *ex post facto* provisions of our state and federal constitutions, is unfounded.

B.

[2] We likewise reject defendant's second constitutional argument, grounded upon the principles of due process. It is well established that due process requires that a party be afforded adequate notice

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as to what conduct is prohibited by law, *State v. Elam*, 302 N.C. 157, 161-62, 273 S.E.2d 661, 664-65 (1981), and that a juvenile involved in an adjudicatory proceeding receive written notice of the factual allegations in order to prepare a defense. *In re Gault*, 387 U.S. 1, 31-34, 18 L. Ed. 2d 527, 548-50 (1967). Defendant asserts the foregoing principles were violated because he had no notice in 1993 that his adjudication of delinquency at that time might later be used as an aggravating sentencing factor in 1996. Therefore, according to defendant, consideration of the earlier adjudication in sentencing procedures not in effect in 1993 was violative of due process of law. We do not believe due process reaches to this extent.

The sentencing statute at issue was in effect at the time of the instant offense, and defendant thus was afforded adequate notice that punishment for the crime committed in 1995 was subject to aggravation, as provided in the sentencing statute, by virtue of defendant's delinquency adjudication in consequence of second-degree rape committed in 1993. As our Supreme Court reiterated in *Pinkham v. Mercer*, 227 N.C. 72, 80, 40 S.E.2d 690, 696 (1946) (quoting *The Ann*, 1 F. Cas., 927, (C.C.D. Mass.) (No. 397)):

as soon as the parliament hath concluded any thing, the law intends that every person hath notice thereof, for the parliament represents the body of the whole realm[.]

Because defendant was accorded adequate notice of the applicable sentencing statute and of the conduct prohibited by law at the time of the 1995 offense, therefore, use of defendant's prior adjudication of delinquency as an aggravating factor under the applicable sentencing scheme was not violative of due process.

Also in the due process context, defendant further insists that had his 1993 counsel been aware that a delinquency adjudication could have followed him into adult court as an aggravating factor in future criminal proceedings, the defense strategy would have been less cooperative and more adversarial. This assertion borders on the frivolous. The record reflects that on 17 September 1993, defendant denied the allegations of second-degree rape set forth in the delinquency petition, received a hearing of "all the testimony," and was found delinquent beyond a reasonable doubt based upon the alleged offense. Defendant's current assertion notwithstanding, he was without doubt afforded the full benefits of the adversarial system in regard to his 1993 delinquency adjudication.

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C.

[3] Lastly, defendant contends the doctrine of judicial estoppel operated to preclude consideration by the trial court of the prior adjudication of delinquency as an aggravating factor. Defendant relates that during the juvenile transfer hearing, the assistant district attorney representing the State took the position that delinquency adjudications could not properly be relied upon as aggravating factors in a subsequent criminal proceeding. However, defendant continues, following his conviction at trial wherein the State was represented by a different assistant district attorney, the trial court utilized defendant's prior delinquency adjudication as an aggravating factor in sentencing.

Equitable estoppel prevents one party from taking inconsistent positions in the same or different judicial proceedings, and "is an equitable doctrine designed to protect the integrity of the courts and the judicial process." *Medicare Rentals, Inc. v. Advanced Services*, 119 N.C. App. 767, 769, 460 S.E.2d 361, 363, *disc. review denied*, 342 N.C. 415, 467 S.E.2d 700 (1995).

Assuming *arguendo* that the principle of judicial estoppel may be applied against the government in a criminal proceeding, *see United States v. Kattar*, 840 F.2d 118, 129-30 n.7 (1st Cir. 1988) ("as far as we can tell, th[e] obscure doctrine [of judicial estoppel] has never been applied against the government in a criminal proceeding"), the references to the record cited by defendant reflect no affirmative request on his behalf for a ruling on applicability of the doctrine to the case *sub judice*. The issue thus has not been preserved for our review. *See* N.C.R. App. P. 10(b).

Moreover, defendant concedes the doctrine is invoked by the court in its discretion, *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990), *cert. denied*, 501 U.S. 1260, 115 L. Ed. 2d 1078 (1991), thus precluding this Court from reviewing his contention under a plain error analysis. *See United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993), *cert. denied*, 511 U.S. 1042, 128 L. Ed. 2d 211 (1994) (trial court's failure to invoke doctrine of judicial estoppel in criminal proceeding absent objection does not "rise to the level of plain error").

II.

[4] Defendant next contends "the trial court erred by admitting [his] confession into evidence." Defendant maintains he "had not knowingly and intelligently waived his constitutional rights prior to giving an inculpatory statement." This argument cannot be sustained.

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Following a *voir dire* hearing conducted during the course of trial, the trial court found as fact, *inter alia*, that defendant was not advised by law enforcement officers, prior to making a statement, that he could be tried as an adult. Nevertheless, the court also found defendant was fully advised of his constitutional rights, understood the warnings given to him, the nature of his rights, and the consequence of waiving those rights. The court concluded that based on

the totality of the circumstances surrounding the interrogation including the Defendant's age, intelligence, familiarity with the legal system, education, mental state, his opportunity to consult with his parents, and the method and length of the interrogation, the Defendant knowingly, understandingly, and willingly waived each of his constitutional and statutory rights[.]

As defendant notes, some jurisdictions have held that

before a trial court can conclude that a juvenile has made a clear and intelligent waiver of his rights to counsel and against self-incrimination, the state shall have to establish that he was advised that there was a possibility that he may be tried as an adult.

State v. Lohnes, 324 N.W. 2d 409, 414-15 (S.D. 1982), cert. denied, 459 U.S. 1226, 75 L. Ed. 2d 466 (1983), overruled on other grounds, *State v. Waff*, 373 N.W. 2d 18 (S.D. 1985); accord *State v. Benoit*, 490 A.2d 295, 303 (N.H. 1985); *State v. Loyd*, 212 N.W. 2d 671, 677 (Minn. 1973); *State v. Cano*, 436 P.2d 586, 589 (Ariz. 1968).

However, no such requirement has been established in this state either by our courts or the General Assembly. See N.C.G.S. § 7A-595 (1995) (setting forth statutory requirements for interrogation of juveniles). Defendant's reliance on holdings from other states is therefore unfounded.

A trial court's findings of fact and conclusions of law as to the voluntariness of a confession following a *voir dire* hearing on a motion to suppress the confession are conclusive if supported by competent evidence in the record. *State v. Rook*, 304 N.C. 201, 212, 283 S.E.2d 732, 740 (1981), cert. denied, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). The record herein contains plenary evidence to sustain the court's findings that defendant's confession was made after he was apprised of his constitutional and juvenile rights, that defendant

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understood these rights and the consequences of waiver thereof, and that he voluntarily and willingly waived his constitutional and statutory rights. The trial court did not err in admitting defendant's confession into evidence.

III.

[5] As a final matter, defendant argues the juvenile transfer statute, N.C.G.S. § 7A-610(a) (1995), is unconstitutionally vague. However, defendant acknowledges this argument was decided against him in *State v. Green*, 124 N.C. App. 269, 477 S.E.2d 182 (1996), *disc. review denied and notice of appeal retained*, 345 N.C. 644, 483 S.E.2d 714 (1997). When a panel of this Court has decided the same issue in a different case, subsequent panels are bound to the decision until it is overturned by a higher court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989). This Court's holding in *Green* thus remains controlling.

No error.

Judges GREENE and WALKER concur.

EDWARD EARL SIMMONS, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION, DEFENDANT

No. COA97-422

(Filed 20 January 1998)

1. State § 35 (NCI4th)— Tort Claims action—welding DOT storage tank—inherently dangerous

The trial court did not err in a Tort Claims action arising from an injury to a welder working on a DOT asphalt storage tank by affirming the Industrial Commission's conclusion that negligence by defendant was the proximate cause of plaintiff's injuries. DOT owed plaintiff a duty to provide a safe work environment because plaintiff's work was inherently or intrinsically dangerous in that it could be performed safely with certain precautions, but, in the ordinary course of events, would cause injuries if those precautions were omitted. The Commission's conclusion that DOT negligently breached its duty to plaintiff was justified by findings which were supported by competent evidence.

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2. State §§ 55 (NCI4th)—explosion while welding DOT storage tank—negligence of DOT—proximate cause

The Industrial Commission did not err in a Tort Claims action arising from an explosion which injured a welder on an asphalt storage tank by finding and concluding that a proximate cause of plaintiff's injury was the negligence of a DOT employee, although evidence existed to support another finding.

3. State § 36 (NCI4th)—explosion while welding DOT storage tank—no contributory negligence by welder

The North Carolina Industrial Commission did not err by concluding that plaintiff-welder was not contributorily negligent in a Tort Claims action arising from an explosion on a DOT asphalt storage tank where the Commission's conclusion was justified by findings supported by competent evidence that plaintiff used a gas detection device to check for combustible vapors or gases in and around the tank prior to the explosion even though he failed to install a required vapor seal.

Appeal by defendant from an order and award entered 9 December 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 December 1997.

Stephen E. Culbreth; and Yow, Fox & Mannen, L.L.P., by Jerry A. Mannen, Jr., for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Carol K. Barnhill, for the State.

WALKER, Judge.

Plaintiff initiated a claim before the North Carolina Industrial Commission under N.C. Gen. Stat. § 143-291 *et seq.*, the Tort Claims Act. After a hearing, the deputy commissioner entered an order concluding that the negligence of defendant's named employee was the proximate cause of plaintiff's injuries and that plaintiff was not contributorily negligent. The parties then filed a stipulation of damages, and the deputy commissioner issued an order in which plaintiff was awarded \$100,000.00 in damages. Defendant N.C. Department of Transportation (DOT) appealed to the Full Commission (Commission), which issued an order with findings, conclusions and an award consistent with those of the deputy commissioner.

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The findings of the Commission tend to show that High Rise Service Company, Inc. (High Rise) is in the business of providing contract work regarding tank repairs, welding and pipe-fitting for the petroleum and chemical industry. In 1992, High Rise contracted with DOT to perform certain welding and metal fabrication work on 10,000 gallon asphalt storage tanks located at various DOT sites, including Durham, North Carolina. The purpose of this work was to fabricate the tanks to accommodate circulation equipment so that another asphalt material could be stored in the tanks.

In a letter dated 13 May 1992, Andy Simmons (Simmons), the president of High Rise, advised a representative from DOT that High Rise had devised a plan of completing the work on the tanks without the tanks having to be emptied. In order to accomplish this plan, the heating element in the tanks had to be turned off and the tanks left open for a period of time to allow the contents of the tanks to cool to the surrounding temperature. Further, Simmons stated that prior to beginning the work on the tanks, a two-step safety process would be followed, which consisted of (1) checking the tank for the presence of flammable gas with a gas detection device, and (2) sealing off the manhole inside the tank with a vapor seal.

On 18 June 1992, plaintiff was employed by High Rise as a welder. In the course of his employment, plaintiff often times encountered flammable gases and other substances. As such, plaintiff was trained to use equipment designed to detect the presence of flammable gas in or around a tank. On the date in question, plaintiff arrived at the Durham DOT site with a co-worker in order to perform the contracted work. Upon arrival, he met with H.A. Moore (Moore), the maintenance supervisor for the Durham site. At that time, Moore told plaintiff that the heating element in the tank had been turned off and the manhole to the tank had been open for at least two weeks, such that the tank was now ready to be worked on.

Prior to beginning work, plaintiff inspected the tank and determined that a three-inch overflow pipe needed to be removed in order for the vapor seal to be installed properly in the manhole. After receiving Moore's permission to remove the overflow pipe, plaintiff checked the area in and around the tank for the presence of flammable vapors or gases with a standard gas detection instrument. The gas detector was provided by High Rise and had been re-calibrated on or about 2 June 1992.

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After detecting no combustible materials in or around the tank, plaintiff started an electric portabon saw to remove the overflow pipe from the tank. When plaintiff engaged the saw, a spark from the saw's armature ignited fumes in the tank, resulting in an explosion which severely burned plaintiff's upper torso.

Given these facts, the Commission made the following additional findings:

14. The Department of Transportation and its named State employee, Mr. H.A. Moore, was negligent in that he knew or should have known that the heating elements in the Durham tank had not been turned off, and the tank had not been left open for two weeks as called for in High Rise's contract. In addition, by failing to indicate to plaintiff the true temperature of the product contained in the Durham tank and by failing to indicate to plaintiff that the tank had a thermometer, these negligent acts were the proximate cause of plaintiff's injuries.

15. Plaintiff was not contributorily negligent for his injuries in that he checked for the presence of combustible gases with a gas detection device. Plaintiff was familiar with the proper use of the gas detection device, and he properly used the device on this occasion.

[1] The Tort Claims Act was enacted in order to enlarge the rights and remedies of a person who is injured by the negligence of a State employee who was acting within the course of his employment. *See Wirth v. Bracey*, 258 N.C. 505, 508, 128 S.E.2d 810, 813 (1963). Pursuant to the statute, the Commission has exclusive jurisdiction to hear claims falling under this Act. N.C. Gen. Stat. § 143-291(a) (1996).

Decisions of the Commission awarding damages to a plaintiff under the Tort Claims Act can only be appealed to this Court "for errors of law . . . under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (1996). This is so even if there is evidence which would support findings to the contrary. *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 683-684, 159 S.E.2d 28, 30-31 (1968). Therefore, when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact,

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and (2) whether the Commission's findings of fact justify its conclusions of law and decision. *Id.* at 684, 159 S.E.2d at 31.

Actions to recover for the negligence of a State employee under the Tort Claims Act are guided by the same principles that are applicable to other civil causes of action. *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988). Therefore, to establish an actionable claim for negligence, plaintiff must show that (1) DOT owed plaintiff a duty of care; (2) the actions, or failure to act, by DOT's named employee breached that duty; (3) this breach was the actual and proximate cause of plaintiff's injury; and (4) plaintiff suffered damages as a result of such breach. *Id.*

With regard to the first element, since "plaintiff was on the premises by invitation and was injured while rendering a 'direct and substantial benefit' to the defendant," he was an invitee. David A. Logan and Wayne A. Logan, *North Carolina Torts* § 5.20, at 107 (1996); see also *Cook v. Morrison*, 105 N.C. App. 509, 515, 413 S.E.2d 922, 925 (1992). As such, the applicable duty of care owed by DOT to plaintiff was "to exercise ordinary care to keep the premises in a reasonably safe condition so as not to expose him unnecessarily to danger, and to give warning of hidden conditions and dangers of which . . . [it] had express or implied knowledge." *Cook v. Morrison*, 105 N.C. App. at 515, 413 S.E.2d at 925 (quoting *Southern Railway Co. v. ADM Milling Co.*, 58 N.C. App. 667, 673, 294 S.E.2d 750, 755, disc. review denied, 307 N.C. 270, 299 S.E.2d 215 (1982)).

However, this duty of care does not apply to the actual work undertaken by plaintiff, unless the activity is an inherently or intrinsically dangerous activity. *Id.* Therefore, since High Rise contracted with DOT to perform work on the storage tank, and plaintiff was injured while performing such work, DOT did not owe a duty to plaintiff unless the work plaintiff was engaged in can properly be characterized as inherently or intrinsically dangerous.

Whether an activity is inherently or intrinsically dangerous is a question of law. *Deitz v. Jackson*, 57 N.C. App. 275, 280, 291 S.E.2d 282, 286 (1982). Although no bright line has been drawn by our courts as to what constitutes an inherently or intrinsically dangerous activity, it is generally understood that an activity will be characterized as such if it can be performed safely provided certain precautions are taken, but will, in the ordinary course of events, cause injury to others if these precautions are omitted. See *Evans v. Rockingham Homes, Inc.*, 220 N.C. 253, 17 S.E.2d 125 (1941) (Where the court held

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that “[t]his rule is sufficiently comprehensive to embrace, not only work which, from its description[], is ‘inherently’ or ‘intrinsically dangerous,’ but also work which will, in the ordinary course of events, occasion injury to others if certain precautions are omitted, but which may, as a general rule, be executed with safety if those precautions are adopted.” *Id.* at 258, 17 S.E.2d at 128).

Further, if the activity is inherently or intrinsically dangerous and the employer knows or should know of the circumstances creating the danger, then the employer has a nondelegable duty to the independent contractor’s employees “to exercise due care to see that . . . [these employees are] provided a safe place in which to work and proper safeguards against any dangers as might be incident to the work [are taken].” *Cook v. Morrison*, 105 N.C. App. at 516, 413 S.E.2d at 926 (quoting *Woodson v. Rowland*, 329 N.C. 330, 357, 407 S.E.2d 222, 238 (1991)). This liability exists to enforce the public policy that the employer should not be allowed to escape liability for injuries resulting from the performance of this type of activity simply by entrusting the duty of such performance with an independent contractor. *Evans v. Rockingham Homes, Inc.*, 220 N.C. at 259, 17 S.E.2d at 128-129.

Here, the Commission’s findings establish that DOT contracted with High Rise to perform certain work on an asphalt storage tank which contained a flammable product. To perform such work, the heating element for the storage tank was required to be turned off, and the manhole to the tank was required to remain open for a period of time in order for the contents of the tank to cool to the surrounding temperature such that the risk of the contents igniting would be reduced. High Rise’s safety procedures required plaintiff to check the area in and around the tank for the presence of flammable vapors or gases with a gas detection device and seal the manhole to the tank prior to beginning such work. These facts indicate that the work plaintiff was to perform on DOT’s premises was inherently or intrinsically dangerous, in that it could be performed in a safe manner provided certain precautions were taken, but if such precautions were not followed, injury may result to others. Therefore, DOT did owe plaintiff a duty to exercise reasonable care in providing plaintiff with a safe work environment.

However, in order to establish that DOT was negligent, plaintiff must also show that DOT breached this duty. The Commission found that DOT breached its duty in that DOT’s employee, Moore, (1) knew or should have known that the heating element in the Durham tank

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had not been turned off, and the manhole had not been left open for two weeks to allow the contents to cool to the surrounding temperature; (2) failed to indicate to plaintiff the true temperature of the product in the tank; and (3) failed to indicate to plaintiff that the tank had a thermometer from which plaintiff could determine the true temperature of the product in the tank. After a careful review, we find that the Commission's findings are supported by competent evidence and justify its conclusion that DOT negligently breached its duty to plaintiff of providing a safe workplace and enacting proper safeguards against dangers incident to plaintiff's work.

[2] Next, in order to recover under the Tort Claims Act, plaintiff must further establish that Moore's breach of duty was the actual and proximate cause of plaintiff's injuries. *Register v. Administrative Office of the Courts*, 70 N.C. App. 763, 766, 321 S.E.2d 24, 27 (1984). In addressing this issue, our Court has stated:

Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed. foreseeability is thus a requisite of proximate cause, which is, in turn, a requisite for actionable negligence.

Westbrook v. Cobb, 105 N.C. App. 64, 67, 411 S.E.2d 651, 653 (1992) (citation omitted). However, Moore's negligence need not be the *sole proximate cause* of plaintiff's injury, so long as his negligence was *one of the proximate causes* of the injury. *Trust Co. v. Board of Education*, 251 N.C. 603, 609, 111 S.E.2d 844, 849 (1960).

Upon review, we find that although evidence exists that may support a contrary finding, the Commission's findings are supported by competent evidence and justify its conclusion that Moore's negligence was a proximate cause of plaintiff's injury.

Therefore, plaintiff has established a *prima facie* case of negligence, and the Commission did not err by making findings and conclusions as such.

[3] DOT's final contention is that regardless of whether it was negligent in causing plaintiff's injuries, plaintiff is absolutely barred from recovering due to his contributory negligence.

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The Tort Claims Act provides that:

Contributory negligence on the part of the claimant . . . shall be deemed to be a matter of defense on the part of the State department, institution or agency against which the claim is asserted, and such State department, institution or agency shall have the burden of proving that the claimant . . . was guilty of contributory negligence.

N.C. Gen. Stat. § 143-299.1 (1996). Further, our Supreme Court has held that “[w]hile inferences may be drawn by the Commission from facts leading reasonably thereto, a conclusion of . . . contributory negligence may not be drawn in favor of the party having the burden of proof upon no basis other than speculation and unproved possibilities.” *Barney v. Highway Comm.*, 282 N.C. 278, 285, 192 S.E.2d 273, 277 (1972).

The State contends that plaintiff's failure to install a vapor seal on the manhole prior to beginning his work was the proximate cause of his injury; therefore, plaintiff was contributorily negligent as a matter of law. However, the Commission found that plaintiff was not contributorily negligent in that prior to beginning work, plaintiff properly used a gas detection device to check for the presence of combustible vapors or gases in and around the tank.

We find that the Commission's findings are supported by competent evidence and justify its conclusion that plaintiff was not contributorily negligent. Therefore, the decision and order of the Commission is affirmed.

Affirmed.

Judges LEWIS and TIMMONS-GOODSON concur.

IN THE COURT OF APPEALS
ESTATE OF JIGGETTS v. CITY OF GASTONIA

[128 N.C. App. 410 (1998)]

STATE OF NORTH CAROLINA GASTON COUNTY ESTATE OF JEREMIAH JIGGETTS,
BY AND THROUGH ITS CO-ADMINISTRATORS GRACE JIGGETTS AND RALPH
JIGGETTS, PLAINTIFFS v. THE CITY OF GASTONIA, DEFENDANT

No. COA97-389

(Filed 20 January 1998)

1. Highways, Streets, and Roads § 55 (NCI4th)— intersection of State highway and city street—pedestrian struck by vehicle—no duty by city

Since the intersection of a State highway and city street is a part of the State highway system, the city owed no duty to a pedestrian to maintain the intersection or to install traffic control devices or lower the speed limit at the intersection, and its failure to do so could not render the city liable for the death of a student who was struck by a vehicle while crossing the State highway at this intersection.

2. Highways, Streets, and Roads § 55 (NCI4th)— pedestrian struck by vehicle—State highway in city—safety measures by city—not showing of duty by city

Safety measures taken by a city after a student was struck by a vehicle at an intersection that was a part of the State highway system, including lowering the speed limit, painting crosswalks, and installing pedestrian heads and push buttons, did not demonstrate the city's control over the intersection so as to render it liable for the student's death because the city could not take such measures without the approval of the NCDOT, and those measures are only discretionary governmental functions.

3. Highways, Streets, and Roads § 55 (NCI4th)— pedestrian struck by vehicle—state highway in city—no showing of third-party beneficiary rights

The estate of a student struck by a vehicle at an intersection in defendant city that was a part of the State highway system failed to forecast evidence of a claim as a third-party beneficiary of a purported contract between the city and the NCDOT for the city to maintain the intersection where there was no allegation of such a contract, and no contract was presented to the trial court.

Appeal by plaintiff from order entered 13 January 1997 by Judge Loto G. Caviness in Gaston County Superior Court. Heard in the Court of Appeals 20 November 1997.

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Nicholas Street Law Offices, by Edgar F. Bogle, for plaintiff appellants.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson, for defendant appellee.

SMITH, Judge.

Grace and Ralph Jiggetts, co-administrators of the estate of Jeremiah Jiggetts (plaintiffs), instituted this action against the City of Gastonia, North Carolina (the City), seeking compensatory damages for the wrongful death of their son, Jeremiah Jiggetts. On the morning of 4 October 1994, Jeremiah was walking to school in a northerly direction along Lyon Street, a municipal street located in the City. As he crossed Hudson Boulevard, a North Carolina Department of Transportation State highway system street, he was struck and killed by a vehicle traveling east on Hudson Boulevard.

In the complaint, plaintiffs alleged that, because the intersection of Hudson Boulevard and Lyon Street was located near two sizable schools, the intersection contained a high volume of pedestrian traffic. Plaintiffs further alleged the City was negligent in that it failed to construct a crosswalk area in the intersection, failed to erect warning signs along Hudson Boulevard to notify drivers of the high volume of pedestrian traffic, failed to provide a crossing guard or electronic pedestrian crossing lights to aid pedestrians crossing the intersection, and failed to set, maintain and control a safe speed limit for the intersection. The City thereafter filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), (6) and (7) (1990 and Cum. Supp. 1996) for lack of jurisdiction over the subject matter and person, failure to state a claim upon which relief can be granted, and failure to join a necessary party. The trial court granted this motion.

[1] On appeal, plaintiffs first contend the trial court erred by granting defendant's motion to dismiss since Lyon Street is a municipal street under the jurisdiction and control of the City, and not part of the State highway system. Because the City owed plaintiffs a duty to maintain Lyon Street, plaintiffs argue the City should be held liable for negligence concerning any part of the street, including that part intersecting with Hudson Boulevard, a State highway system street. Thus, plaintiffs claim N.C. Gen. Stat. § 160A-297 (1994) does not exculpate the City from liability for Jeremiah's death.

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We initially note that in ruling on defendant's motion to dismiss, the trial court considered exhibits and other material submitted by both parties. According to N.C. Gen Stat. § 1A-1, Rule 12(b),

[i]f, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56

We therefore treat the City's motion to dismiss as a motion for summary judgment. *See also Locus v. Fayetteville State University*, 102 N.C. App. 522, 526, 402 S.E.2d 862, 865 (1991).

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). "In ruling on the motion the court must consider the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial." *Snipes v. Jackson*, 69 N.C. App. 64, 72, 316 S.E.2d 657, 661, *disc. review denied and appeal dismissed*, 312 N.C. 85, 321 S.E.2d 899 (1984).

To survive a motion for summary judgment, plaintiffs "must allege a *prima facie* case of negligence—defendant[] owed plaintiff[s] a duty of care, defendant['s] conduct breached that duty, the breach was the actual and proximate cause of plaintiff['s] injury, and damages resulted from the injury." *Mizell v. K-Mart Corp.*, 103 N.C. App. 570, 573, 406 S.E.2d 310, 311 (1991) (quoting *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 416, 395 S.E.2d 112, 115 (1990)), *aff'd*, 331 N.C. 115, 413 S.E.2d 799 (1992). The issue presented in the instant case is whether the City owed a duty to plaintiffs to construct cross-walks, erect warning signs, provide crossing guards and pedestrian crossing lights, and set a lower speed limit at the intersection of Hudson Boulevard, a State highway system street, and Lyon Street, a municipal street.

N.C. Gen. Stat. § 136-45 (1993) sets forth the general purpose of the laws creating the North Carolina Department of Transportation (NCDOT) and recites that one of these purposes is to permit the State "to assume control of the State highways, repair, construct, and reconstruct and maintain said highways at the expense of the entire

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State, and to relieve the counties and cities and towns of the State of this burden." Thus, according to N.C. Gen. Stat. § 136-66.1(1) (Cum. Supp. 1996):

The State highway system inside the corporate limits of municipalities shall consist of a system of major streets and highways necessary to move volumes of traffic efficiently and effectively from points beyond the corporate limits of the municipalities through the municipalities and to major business, industrial, governmental and institutional destinations located inside the municipalities. The Department of Transportation shall be responsible for the maintenance, repair, improvement, widening, construction and reconstruction of this system.

In turn, N.C. Gen. Stat. § 160A-297(a) provides that "[a] city shall not be responsible for maintaining streets or bridges under the authority and control of the Board of Transportation, and shall not be liable for injuries to persons or property resulting from any failure to do so." Further, this Court has held that:

[W]hen a city street becomes a part of the State highway system, the Board of Transportation is responsible for its maintenance thereafter which includes the control of all signs and structures within the right-of-way. Therefore, in the absence of any control over a state highway within its border, a municipality has no liability for injuries resulting from a dangerous condition of such street unless it created or increased such condition.

Shapiro v. Toyota Motor Co. Ltd., 38 N.C. App. 658, 662, 248 S.E.2d 868, 870 (1978); see also N.C. Gen. Stat. § 136-30(a) (1993).

In the instant case, the record indicates that on 4 October 1994, the intersection of Hudson Boulevard and Lyon Street was part of the State highway system. The trial court, when ruling on the City's motion to dismiss, considered the affidavit of Donald K. Lowe, the City's Traffic Engineer. In his affidavit, Lowe identified Hudson Boulevard and its intersection with Lyon Street as State Road 1255, part of the State highway system. The trial court also considered a NCDOT map of Gaston County which showed Hudson Boulevard and each intersection crossing it as part of the State highway system. Since Hudson Boulevard and each intersection crossing it are part of the State highway system, the City owed no duty to plaintiffs to maintain Hudson Boulevard, install traffic control devices or lower the speed limit on any part of it, including its intersection with Lyon Street.

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[2] Plaintiffs also argue that measures taken by the City after Jeremiah's death to increase the safety of the intersection, including lowering the speed limit, painting crosswalks, and installing pedestrian heads and push buttons, demonstrate the City's control over the intersection. Plaintiffs claim such control imposed on the City a duty of care with respect to the maintenance of the intersection. We find this argument to be without merit. According to N.C. Gen. Stat. § 20-141(f) (Cum. Supp. 1996), concurring ordinances of both NCDOT and a municipality are required when the municipality wishes to alter the speed limit on a street located within the municipality's corporate limits but designated as part of the State highway system. In addition, N.C. Gen. Stat. § 136-30(b) requires that all traffic signs and other traffic control devices placed by a municipality on a street within the corporate limits of the municipality but designated as part of the State highway system must be approved by NCDOT. Thus, because the City could not alter the speed limit or install traffic signs or other traffic control devices on that portion of Hudson Boulevard intersecting Lyon Street without the approval of NCDOT, the City did not have control over the intersection. If the City did, as plaintiffs claim, make subsequent remedial measures without NCDOT approval, these measures would be unauthorized.

We note that the City also owed plaintiffs no affirmative duty to control traffic on Lyon Street. While N.C. Gen. Stat. § 160A-300 (1994) provides that “[a] city may by ordinance prohibit, regulate, divert, control, and limit pedestrian or vehicular traffic upon the public streets, sidewalks, alleys, and bridges of the city,” this Court has stated that:

“The fact that a city has the *authority* to make certain decisions, however does not mean that the city is under an *obligation* to do so. The words ‘authority’ and ‘power’ are not synonymous with the word ‘duty.’ . . . There is no mandate of action. Courts will not interfere with discretionary powers conferred on a municipality for the public welfare unless the exercise (or non-exercise) of those powers is so clearly unreasonable as to constitute an abuse of discretion.”

Talian v. City of Charlotte, 98 N.C. App. 281, 287, 390 S.E.2d 737, 741 (quoting *Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 173, 293 S.E.2d 235, 236 (1982)), *aff'd per curiam*, 327 N.C. 629, 398 S.E.2d 330 (1990). The case law of this jurisdiction “has consistently held that installation, maintenance and timing of traffic control signals at

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intersections are discretionary governmental functions." *Talian*, 98 N.C. App. at 286, 390 S.E.2d at 741. Thus, after viewing the record in the light most favorable to plaintiffs, we conclude plaintiffs have failed to demonstrate a breach of duty owed by the City to plaintiffs with respect to the maintenance of the intersection.

[3] Plaintiffs next contend the trial court erred by granting the City's motion to dismiss because a contract existed between the City and NCDOT, whereby the City agreed to undertake and perform all maintenance, construction and supervision of the intersection. Plaintiffs argue that this contract could impose on the City a duty of care with respect to the maintenance and control of the intersection, and because this contract was not submitted to the trial court, an issue of fact exists as to the presence and interpretation of such contract.

N.C. Gen. Stat. § 136-66.1(3) states, in pertinent part, that:

Any city or town, by written contract with the Department of Transportation, may undertake to maintain, repair, improve, construct, reconstruct or widen those streets within municipal limits which form a part of the State highway system, and may also, by written contract with the Department of Transportation, undertake to install, repair and maintain highway signs and markings, electric traffic signals and other traffic-control devices on such streets.

However, "[s]uch contract does not change the status of the street from one which is a part of the State highway system to one which is part of the city system . . ." *Matternes v. City of Winston-Salem*, 286 N.C. 1, 11, 209 S.E.2d 481, 487 (1974). Thus, the existence of a contract between a city or town and NCDOT for the maintenance of a street within the State highway system does not automatically shift liability for injury from NCDOT to the city or town; such liability must arise expressly out of the contract. *Id.* at 11, 209 S.E.2d at 486. Because "[t]he general rule is that one who is not a party to a contract may not maintain an action for its breach," plaintiffs were required to show they were third-party beneficiaries to the contract between the City and NCDOT in order to bring an action for the contract's breach. *Id.* at 12, 209 S.E.2d at 487.

To maintain a suit for breach of contract on a third-party beneficiary theory, plaintiffs must allege in their complaint: "(1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into

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for [their] direct, and not incidental, benefit.' " *Metric Constructors, Inc. v. Industrial Risk Insurers*, 102 N.C. App. 59, 63, 401 S.E.2d 126, 129 (citations omitted), *aff'd per curiam*, 330 N.C. 439, 410 S.E.2d 392 (1991). Here, plaintiffs did not allege in their complaint that a contract existed between the City and NCDOT for the maintenance of the intersection, nor did it present a contract to the trial court. Based on the complaint and submissions as presented to the trial court, plaintiffs have not alleged a cause of action for breach of contract on a third-party beneficiary theory.

For the above reasons, we conclude the trial court properly granted summary judgment in favor of the City.

Affirmed.

Judges MARTIN, John C., and JOHN concur.

MABLE B. PARIS, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF CHARLES F. PARIS,
PLAINTIFF V. JAMES F. WOOLARD AND H.G. AND W.H. CAHOON, INC., DEFENDANTS
AND THIRD-PARTY PLAINTIFFS V. PENNSYLVANIA MANUFACTURERS' ASSOCIA-
TION INSURANCE COMPANY, AGENCY SERVICES, INC. AND TIDELAND INSUR-
ANCE AGENCY, THIRD-PARTY DEFENDANTS

NO. COA97-460

(Filed 20 January 1998)

**1. Appeal and Error § 426 (NCI4th)— brief—type size—char-
acters per line—required by Appellate Rules**

Although appellant ASI's brief did not comply with N.C. R. App. P. 26(g), which requires that briefs have 11 point type and allows a maximum of ten characters per inch for all printed material, the Court of Appeals addressed the general thrust of appellant's argument pursuant to N.C. R. App. 2 in deference to the litigants and for reasons of judicial economy.

**2. Insurance § 631 (NCI4th)— automobile insurance—cancel-
lation—premium finance company—notice requirement**

The trial court did not err in an action arising from an automobile accident by granting summary judgment for third-party plaintiffs against defendant PMA, which issued a business automobile liability policy to third-party plaintiffs, and ASI, which

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financed the premiums, where ASI did not comply with the statutory requirements of N.C.G.S. § 58-35-85 by waiting at least ten days after giving the insured notice of intent to cancel before mailing the insurer a request for cancellation.

3. Insurance § 631 (NCI4th)— supplemental affidavit—motion to file denied—cancellation of insurance—ten day waiting period—calculation

The trial court did not err by denying the third-party defendant's motion to file a supplemental affidavit in an action involving automobile insurance coverage where the third-party defendant financed the premiums but did not comply with the statutorily mandated ten day waiting period before sending a notice of cancellation to the insurer. The statute does not mean ten days before the cancellation date. N.C.G.S. § 58-35-85.

4. Pleadings § 362 (NCI4th)— amended pleadings—cross-claim added—no error

There was no error in a declaratory judgment action to determine automobile insurance coverage in allowing the insurer to amend its pleadings to add a cross-claim against an insurance premium finance company since liability arose from the conduct of that company alone.

5. Insurance § 631 (NCI4th)— automobile insurance policy—improper notice—liability of premium finance company

The trial court did not err by granting summary judgment for PMA against ASI in a declaratory judgment action to determine insurance coverage under a business automobile liability policy issued by PMA and financed by ASI where ASI's failure to abide by the statute for cancellation of the policy was the sole reason for PMA's liability to plaintiff. An insurance company that receives an improper request for cancellation by a premium finance company failing to comply with the provisions of N.C.G.S. § 58-35-85 is entitled to redress from the premium finance company.

Appeal by third-party defendant Agency Services, Inc., from summary judgments entered in Craven County Superior Court by Judge Herbert O. Phillips, III, on 27 July 1994 and by Judge James E. Ragan, III, on 17 January 1997. Heard in the Court of Appeals 4 December 1997.

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Ross Law Firm, by C. Thomas Ross, for Agency Services, Inc., third-party defendant appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Edward C. LeCarpentier, III, and Patricia L. Holland, for Pennsylvania Manufacturers' Association Insurance Company, third-party defendant appellee.

SMITH, Judge.

On 18 February 1992, plaintiff Mable B. Paris, individually and as executrix of the estate of Charles F. Paris, sought damages for injuries sustained in an automobile accident that occurred on 25 April 1991 involving defendant James F. Woolard ("Woolard"). During this accident, Woolard was driving a vehicle owned and insured by his employer W. H. Cahoon, Inc. ("Cahoon").

On 24 April 1992, defendants Woolard and Cahoon filed a third-party complaint against Pennsylvania Manufacturers' Association Insurance Company ("PMA") to obtain a declaration of rights under a business automobile liability insurance policy issued to Cahoon by PMA. Cahoon alleged that the liability insurance coverage was effective on the date of the automobile accident. PMA alleged that the policy had been cancelled prior to the date of the accident.

On 10 September 1993, Woolard and Cahoon added an additional third-party defendant, Agency Services, Inc. ("ASI"), who financed the premiums for the insurance coverage of Cahoon. Woolard and Cahoon alleged that ASI failed to follow certain procedures required by N.C. Gen. Stat. § 58-35-85 (1989) to properly cancel the coverage provided by the insurance policy.

On 26 May 1994, ASI moved for summary judgment. Thereafter, on 7 June 1994, PMA also moved for summary judgment. On 16 June 1994, Woolard and Cahoon as third-party plaintiffs moved for summary judgment as to their third-party action against PMA and ASI. On 27 July 1994, Judge Herbert O. Phillips, III, denied the summary judgment motions of ASI and PMA, and granted summary judgment in favor of plaintiff Paris and Woolard and Cahoon as third-party plaintiffs. Judge Phillips' order held that the insurance policy was in effect on the date of the accident and thus provided coverage for Woolard and Cahoon.

Subsequent to Judge Phillips' order, PMA and ASI appealed to this Court. That appeal was dismissed as interlocutory. PMA began

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settlement negotiations with plaintiff Paris and advised ASI of these negotiations. On 5 October 1995, ASI stated that any settlement of claims up to \$200,000.00 was reasonable. On 15 December 1995, plaintiff Paris, defendants Woolard and Cahoon, and PMA settled the tort action for \$197,500.00. However, ASI did not participate in or contribute to this settlement.

On 18 July 1996, PMA amended its answer to assert a crossclaim for indemnity against ASI. On 26 August 1996, PMA filed a summary judgment motion as to the claims for indemnity and for actual damages. ASI filed a summary judgment motion on 25 October 1996 as to all claims against ASI. Judge James E. Ragan, III, entered an order on 17 January 1997 granting summary judgment to PMA, denying summary judgment to ASI, and ordering ASI to indemnify PMA in the amount of \$250,585.33, plus interest and future costs and fees. ASI appeals from both grants of summary judgment.

[1] Before we address the merits of this case, we note that appellant ASI's brief does not comply with Rule 26(g) of the Rules of Appellate Procedure which requires that "[a]ll printed matter must appear in at least 11 point type." In addition, Rule 26(g) provides that there must be only ten characters per inch. *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 147, 468 S.E.2d 269, 273 (1996). Therefore, "a properly formatted 8.5 by 11 inch page will contain no more than 65 characters per line." *Id.* ASI's brief violates this rule because it has approximately 98 characters per line. A violation of the type size restriction could result in the imposition of sanctions pursuant to N.C.R. App. P. 25(b) and 34(b). *Tate Terrace Realty Investors, Inc. v. Currituck County*, 127 N.C. App. 212, 217, 488 S.E.2d 845, 848 (1997).

The appellate rules are not optional; they are mandatory and failure to follow the rules subjects an appeal to dismissal. *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984). Notwithstanding the errors, in deference to the litigants and for reasons of judicial economy, we nevertheless address the general thrust of appellant's argument pursuant to N.C.R. App. P. 2.

[2] The first issue presented for appeal is whether the trial court committed reversible error in granting the motion for summary judgment in favor of Woolard and Cahoon as third-party plaintiffs against PMA and ASI. Appellate review of the grant of summary judgment is limited to two questions, including: (1) whether there is a genuine question of material fact, and (2) whether the moving party is entitled

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to judgment as a matter of law. *Gregorino v. Charlotte-Mecklenburg Hosp. Authority*, 121 N.C. App. 593, 595, 468 S.E.2d 432, 433 (1996). A motion for summary judgment should be granted if, and only if, “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (Cum. Supp. 1996). Evidence is viewed in the light most favorable to the non-moving party with all reasonable inferences drawn in favor of the nonmovant. *Whitley v. Cubberly*, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974).

In the instant case, summary judgment was properly granted in favor of Woolard and Cahoon as third-party plaintiffs, holding that PMA's coverage for Cahoon was in full force and effect on the date of the accident. N.C. Gen. Stat. § 58-35-85 provides that an insurance contract paid for by insurance premium financing cannot be cancelled unless “not less than ten (10) days written notice” is given to the insured concerning the intent of the insurance premium finance company to cancel the insurance contract. N.C. Gen. Stat. § 58-35-85(2) states that only “[a]fter expiration of the period” can the insurance premium finance company mail the insurer a request for cancellation. Thus, N.C. Gen. Stat. § 58-35-85 required the insurance premium finance company, ASI, to wait at least ten days before mailing the insurer a request for cancellation. All the evidence in the record shows that ASI did not wait for ten days to pass after mailing the notice of intent to cancel to Cahoon before it mailed its notice of cancellation to PMA. “In order to cancel a policy the carrier must comply with the procedural requirements of the statute or the attempt at cancellation fails and the policy will continue in effect despite the insured's failure to pay in full the required premium.” *Pearson v. Nationwide Mut. Ins. Co.*, 325 N.C. 246, 254, 382 S.E.2d 745, 748 (1989). Therefore, since ASI failed to comply with the statute, this assignment of error is overruled.

[3] The second issue is whether the trial court erred in denying ASI's motion to file a supplemental or further affidavit. ASI argues that the trial court abused its discretion when it stated that the inclusion of A.E. Bittner's affidavit would not have altered the order allowing summary judgment. However, this assignment of error is without merit since ASI's further affidavit indicates that ASI did not comply with the statutory mandate of “no less than ten days” before sending a notice of cancellation to PMA.

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ASI's position is that the "Notice Of Intent To Cancel had been mailed [to insured Cahoon] at least ten days prior to the specified date of cancellation." However, N.C. Gen. Stat. § 58-35-85 states that the insurance premium company must wait at least ten days before mailing the insurer a request for cancellation. This statute does not mean, as ASI contends, that the ten-day written notice to the insurer must be "before the specified cancellation date." ASI mailed the notice of cancellation to insurer PMA on 4/08/91, which is only seven days after the 4/01/91 notice of intent to cancel was mailed to the insured Cahoon. Since ASI failed to wait the requisite ten days before mailing PMA the request for cancellation, this assignment of error is also overruled.

[4] The third issue is whether the trial court erred in allowing Cahoon and PMA to amend their pleadings. N.C. Gen. Stat. § 1A-1, Rule 15(a) (1990) provides that a party's motion to amend its pleading should be freely granted when justice so requires. In addition, the objecting party has the burden of showing it would be prejudiced if the motion to amend was granted. *Watson v. Watson*, 49 N.C. App. 58, 60, 270 S.E.2d 542, 544 (1980). In the instant case, PMA amended its pleading and added a cross-claim against ASI after plaintiff Paris obtained summary judgment against PMA and ASI, and after it had been established in the trial court that the insurance policy had not been properly cancelled. ASI's actions are the sole reason PMA is liable to plaintiff Paris. Since liability arises from the conduct of ASI alone, there is no prejudice to ASI in allowing PMA's pleadings to be amended. Thus, this assignment of error is overruled.

[5] The fourth issue presented for appeal is whether the trial court committed reversible error in granting the motion for summary judgment in favor of PMA. An insurance company that receives an improper request for cancellation by a premium finance company failing to comply with the provisions of N.C. Gen. Stat. § 58-35-85 is entitled to redress from the premium finance company. *Grant v. State Farm Mut. Auto. Ins. Co.*, 1 N.C. App. 76, 80, 159 S.E.2d 368, 371, *disc. review denied*, 273 N.C. 657, 161 S.E.2d 560 (1968). Furthermore, an insurance company is entitled to full indemnification, including the costs of settling a tort action and related expenses, if its duty to provide coverage arose from the wrongful conduct of another. *Hildreth v. U.S. Cas. Co.*, 265 N.C. 565, 568, 144 S.E.2d 641, 643 (1965). In the instant case, ASI failed to follow the statutory procedures for cancellation of the insurance policy. ASI's failure to abide by the statute is the sole reason PMA is liable to plaintiff Paris. Thus,

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summary judgment was properly granted in favor of PMA and this assignment of error is overruled.

In conclusion, there are no genuine issues of material fact. Accordingly, we affirm both grants of summary judgment.

Affirmed.

Judges MARTIN, John C., and JOHN concur.



POLAROID CORPORATION, PLAINTIFF v. MURIEL K. OFFERMAN, SECRETARY OF REVENUE OF THE
STATE OF NORTH CAROLINA, DEFENDANT

No. COA97-476

(Filed 20 January 1998)

1. Taxation § 114 (NCI4th)— business income—meaning of “and includes”

The phrase “and includes” in N.C.G.S. § 105-130.4 does not create a separate definition of business income but merely provides examples of what fits within the definition of business income.

**2. Taxation § 114 (NCI4th)— patent infringement award—
income taxation—nonbusiness income**

Damages awarded to plaintiff Polaroid in its patent infringement suit against a competitor is nonbusiness income rather than business income under N.C.G.S. § 105-130.4 for income tax purposes where plaintiff is not in the business of licensing its patents; the main purpose of the lawsuit was not to acquire working capital or to increase cash flow but was to prevent the competitor from using its patents and to recover lost profits; and the money received is thus not a part of plaintiff's regular trade or business operations.

Appeal by plaintiff from order entered 28 February 1997 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 4 December 1997.

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Womble Carlyle Sandridge & Rice, PLLC, by Jasper L. Cummings, Jr., for plaintiff appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Kay Linn Miller Hobart, for defendant appellee.

SMITH, Judge.

Plaintiff Polaroid Corporation (“Polaroid”), domiciled in Massachusetts, filed this action seeking a partial tax refund pursuant to N.C. Gen. Stat. § 105-267 (1989) of income tax paid to the State of North Carolina for the 1991 tax year. Polaroid requests a refund of additional assessed taxes and interest totaling \$499,177.00 based on a \$924,526,554.00 recovery from a patent infringement suit Polaroid instigated in 1976 against Eastman Kodak Company (“Kodak”). *See Polaroid Corp. v. Eastman Kodak Co.*, U.S.P.Q.2d 1711 (1991).

For North Carolina corporate income tax purposes, Polaroid classified the total award from that lawsuit as “non-business income” pursuant to N.C. Gen. Stat. § 105-130.4(a)(1) (1989) on its 1991 return. The North Carolina Department of Revenue (“DOR”) disagreed with Polaroid’s treatment of the taxes as non-business income, reclassified the damage award as business income, and assessed additional tax and interest in the amount of \$499,177.00. Polaroid protested the proposed assessment and an administrative hearing was conducted before the Secretary of Revenue, who sustained the assessment. Thereafter, Polaroid paid the tax under protest and filed this action for refund pursuant to N.C. Gen. Stat. § 105-241.4 (1989).

Both parties filed motions for summary judgment. On 28 February 1997, the trial court granted defendant’s motion for summary judgment and denied plaintiff’s motion for summary judgment. Plaintiff Polaroid appeals.

Appellate review of the grant of summary judgment is limited to two questions: (1) whether there is a genuine question of material fact, and (2) whether the moving party is entitled to judgment as a matter of law. *Gregorino v. Charlotte-Mecklenburg Hosp. Authority*, 121 N.C. App. 593, 595, 468 S.E.2d 432, 433 (1996). A motion for summary judgment should be granted if, and only if, “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (Cum. Supp. 1996).

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Evidence is viewed in the light most favorable to the non-moving party with all reasonable inferences drawn in favor of the non-movant. *Whitley v. Cubberly*, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974). When there is no genuine issue of fact, the existence of important or difficult questions of law is no barrier to the granting of summary judgment. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

The first issue presented for appeal is whether the trial court committed reversible error by denying Polaroid a refund of income tax it paid in 1991 on damages from the Kodak lawsuit, plus interest. Polaroid claims this recovery was not business income as defined by N.C. Gen. Stat. § 105-130.4(a)(1), or else it was not subject to taxation under the United States Constitution.

N.C. Gen. Stat. § 105-130.4(a)(1) defines “business income” as income arising from transactions and activity in the regular course of the corporation’s trade or business and includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation’s regular trade or business operations.

In contrast, “nonbusiness income” is defined as “all income other than business income.” N.C. Gen. Stat. § 105-130.4(a)(5).

“[W]hen there is doubt as to the meaning of a statute levying a tax, it is to be strictly construed against the State and in favor of the taxpayer.” *In re Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974). This rule is only applicable when there is ambiguity in the statute. *Id.* at 219, 210 S.E.2d at 202. If the words of a definition in a statute are ambiguous, “they must be construed pursuant to the general rules of statutory construction” *USAir, Inc. v. Faulkner*, 126 N.C. App. 501, 503-04, 485 S.E.2d 847, 849 (1997) (quoting *In re Clayton-Marcus Co. Inc.*, 286 N.C. at 219-20, 210 S.E.2d at 203). These general rules of statutory construction include giving words their common and ordinary meaning, as well as giving effect to the intent of the Legislature. *Id.*

[1] In the instant case, Polaroid claims, in part, that business income has only one meaning, and that the phrase “and includes” in the definition merely provides examples of what fits within the definition. In contrast, DOR claims that business income has two definitions, one before the words “and includes” in the statute, and the

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other definition after those words. An interpretation of N.C. Gen. Stat. § 105-130.4 requires us to give the phrase “and includes” its ordinary meaning.

The North Carolina Supreme Court has stated that the term “includes” does not mean “in addition to.” *Miller v. Johnston*, 173 N.C. 62, 69, 91 S.E. 593, 597 (1917). Furthermore, Webster’s Dictionary defines “include” as a “compromise as a discrete or subordinate part or item of a larger aggregate, group, or principle . . .” Webster’s Third New International Dictionary (1971). Therefore, the words “and includes” in N.C. Gen. Stat. § 105-130.4 do not create a separate definition of business income.

Defendant DOR argues that N.C. Gen. Stat. § 105-130.4 is based on the Model Tax Act and that this Act adopts a functional approach in the definition of business income. However, our statute differs from the Model Act. In the Model Act, business income can arise from two types of activities of a business, “either of which classifies an item of income as business income.”

First, business income can be derived from transactions and activities that constitute the conduct of the taxpayer’s trade or business. Second, business income can be derived from a transaction involving property that does not by itself constitute the conduct of the taxpayer’s trade or business, if the taxpayer holds or held its interest in the property in furtherance of the trade or business beyond the mere financial betterment of the taxpayer in general.

Exhibit D—Multistate Tax Commission—November 1994. As we have already mentioned, the language “and includes” in N.C. Gen. Stat. § 105-130.4 does not mean there are two separate definitions of business income. DOR’s final agency decision in the instant case asserts there are two definitions of business income based on DOR enacting regulations and issuance of a final agency decision. See N.C. Admin. Code tit. 2, r. .0703 (April 1991) and North Carolina Department of Revenue Final Agency Decision No. 90-37. In our interpretation we construe “and includes” to mean “and some examples are.” To change the ordinary meaning of a statute, an act of the General Assembly is required. DOR may not change or amend the plain meaning of a statute by administrative regulation, final agency decision, or both.

Normally the construction of a statute is a question of law for the courts. *Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 642, 256 S.E.2d 692,

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696 (1979). Thus, whether income fits into the statutory definition of business income or non-business income would ordinarily be a question of law. However, we are aware of *National Service Industries, Inc. v. Powers*, 98 N.C. App. 504, 508, 391 S.E.2d 509, 512, *appeal dismissed and disc. review denied*, 327 N.C. 431, 395 S.E.2d 685 (1990), holding that whether certain income is business income is a question of fact.

In that case, plaintiff taxpayer had purchased electricity generating equipment and leased it back to the seller. There was a disputed issue of fact as to whether the purchase and subsequent lease back produced business income, since the taxpayer was not specifically in the electricity generating business. Based on the disputed facts, the jury in that case determined that the actions of the business were done as an investment to acquire working capital and to increase cash flow, both integral parts of a business. The jury held that an investment was in the regular course of the taxpayer's business and therefore constituted business income. This Court affirmed. Thus, the classification of whether a company's action falls "within the regular course of business" for that particular company may involve a factual determination. We note that in *National Service Industries*, DOR took the position that the income generated by the leases was non-business income because plaintiff was not engaged in the business of generating electricity, a position we believe is diametrically opposed to DOR's argument in the case at bar.

Once a factual determination has been made, if one is required, then the issue of whether the income falls within the definitions set out in the statute becomes one of law. See *Wood*, 297 N.C. at 640, 256 S.E.2d at 695-96. Thus, the *National Service Industries* case merely stands for the proposition that once an activity of a business has been classified through a factual determination as "in the regular course of its business," whether that income then fits the statutory definition of business income involves a question of law. Therefore, whether the income falls within the general definition of business income or non-business income set out in N.C. Gen. Stat. § 105-130.4 can present a mixed question of fact and law.

[2] In the instant case, the undisputed facts show that Polaroid is not in the business of licensing patents. Polaroid argues that, because it does not license its patents, the recovery received for patent infringement is not in the regular course of its business, such that the acquisition, management, and/or disposition of the lawsuit damages constitute integral parts of the corporation's regular trade or business

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operations. Webster's Dictionary defines "regular" as "steady or uniform in course, practice, or occurrence" and further includes synonyms of the word such as "normal," "typical," and "natural." Webster's Third New International Dictionary (1971).

Unlike the *National Service Industries* case involving an investment, the main purpose of the Kodak lawsuit was not to acquire working capital or to increase cash flow, both activities in the regular course of business. Instead, Polaroid instigated the patent infringement suit to prevent Kodak from using Polaroid's patents and to recover lost profits. Since licensing patents to other companies is not in the regular course of Polaroid's business operations, the recovery of damages would not be in the regular course of its business. The protection of Polaroid's patents may be classified as a business activity, but it is an extraordinary event instead of an integral part of Polaroid's regular trade or business operations. Because there is no factual dispute concerning the regular course of Polaroid's business, all that remains is the statutory interpretation of the definition of business income, which is a question of law. *See Wood*, 297 N.C. at 642, 256 S.E.2d at 696.

It follows that, since the money received is not an integral part of Polaroid's regular trade or business operations, the income derived from the damages recovery cannot properly be classified under N.C. Gen. Stat. § 105-130.4 as business income. The income derived from the Kodak lawsuit must be classified as non-business income. Thus, Polaroid is entitled to a refund.

The trial court erred by granting the summary judgment motion in favor of defendant. Although there is no genuine issue of material fact, the trial court incorrectly interpreted N.C. Gen. Stat. § 105-130.4. Thus, we reverse and remand this case for entry of an order granting summary judgment for Polaroid. In light of the foregoing reasoning, we need not address plaintiff's other assignments of error.

Reversed and remanded.

Judges MARTIN, John C., and JOHN concur.

MGM TRANSPORT CORP. v. CAIN

[128 N.C. App. 428 (1998)]

MGM TRANSPORT CORPORATION AND LIBERTY MUTUAL INSURANCE COMPANY, PLAINTIFFS v. ELSIE R. CAIN, TIMOTHY CLARK BUTTERFIELD, JAMES CLEVELAND HOLMES AND NORTHLAND INSURANCE COMPANY, DEFENDANTS

No. COA97-699

(Filed 20 January 1998)

Insurance § 1182 (NCI4th)— leased tractor—liability insurance—non-trucking use endorsement—use in business of lessee—exclusion of coverage under lessor's policy

A bobtailing tractor was being used “in the business of” the lessee at the time of an accident so that a non-trucking use endorsement in the lessee’s liability policy, which excluded coverage for the tractor while it was being used “in the business of anyone to whom the [tractor] is rented,” applied to exclude coverage under that policy where the driver was required by the lessee to keep the tractor at his home, and at the time of the accident the driver was acting under the lessee’s instructions to drive the tractor to its terminal to pick up a shipment.

Appeal by plaintiffs from order entered 20 March 1997 by Judge Julius A. Rousseau, Jr., in Davidson County Superior Court. Heard in the Court of Appeals 4 December 1997.

Brinkley, Walser, McGirt, Miller, Smith & Coles, P.L.L.C., by G. Thompson Miller, for plaintiff-appellants.

Bell, Davis & Pitt, P.A., by Stephen M. Russell, for defendant-appellee Northland Insurance Company.

MARTIN, John C., Judge.

MGM Transportation Corporation (MGM) and Liberty Mutual Insurance Company (Liberty Mutual) filed this declaratory judgment action to determine the rights and obligations of the parties under policies of insurance issued by Liberty Mutual to MGM and by Northland Insurance Company (Northland) to defendant Holmes. The dispute arises out of a collision which occurred on 3 August 1994 when a tractor belonging to defendant Holmes and driven by defendant Butterfield collided with an automobile in which defendant Elsie Cain was a passenger. At the time of the collision, Holmes’ tractor was leased to MGM under an “Independent Contractor Agreement.” Cain subsequently brought an action for personal injuries naming Holmes, Butterfield and MGM as defendants.

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MGM maintained liability insurance coverage through a policy issued by Liberty Mutual; Holmes maintained liability insurance coverage through a policy issued by Northland. In their complaint, plaintiffs alleged that the Northland policy provided primary coverage and that Northland should be required to provide a defense to the Cain claim and pay any judgment resulting therefrom, up to its policy limits of \$750,000. In its answer, Northland alleged that its policy contained a Non-Trucking Use Endorsement which excluded coverage for the tractor while it was being used "in the business of anyone to whom the [tractor] is rented," and that at the time of the accident, the tractor was being used in the business of MGM. Northland alleged that Liberty Mutual's policy provided primary coverage for the Cain claim.

Plaintiffs moved for summary judgment. The depositions, affidavits, and exhibits before the trial court showed that MGM, a trucking company engaged in shipping freight in interstate commerce, operates a terminal in High Point. In 1992, MGM entered into an "Independent Contractor Agreement" with Holmes to lease his tractor; the agreement provided that MGM would have "exclusive possession, control and use" of the tractor during the term thereof and required Holmes to provide a driver. The agreement also required MGM to maintain liability insurance coverage on the tractor and required Holmes to maintain "bobtail" or non-trucking use insurance coverage.

On the date of the accident, defendant Butterfield was the driver employed by Holmes to operate the tractor. Pursuant to instructions received from MGM to bring the tractor to the terminal to pick up a shipment, Butterfield was "bobtailing" (driving the tractor without a trailer attached) from his home in Asheboro to MGM's terminal in High Point when the collision occurred which gave rise to Elsie Cain's claim.

The trial court denied plaintiffs' motion for summary judgment and entered summary judgment in favor of defendant Northland, declaring "that the tractor driven by [defendant] Butterfield was being used in the business of plaintiff MGM at the time of the accident . . . and that the Northland Insurance Company policy, with the non-trucking use endorsement, issued to [defendant] Holmes does not provide coverage . . ." Plaintiffs appeal.

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Plaintiffs assign error to the trial court's denial of their motion for summary judgment and to its entry of summary judgment in favor of defendant Northland. Summary judgment is appropriate in a declaratory judgment action where there is no genuine issue of material fact and either party is entitled to judgment as a matter of law, and may be rendered against the non-moving party. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972); N.C. Gen. Stat. § 1A-1, Rule 56(c) (1967). In this case, the material facts are not in dispute; the only issue to be decided is a legal one, i.e., whether the exclusion contained in the Northland policy is applicable.

The Northland policy contained a "Truckers - Insurance for Non-Trucking Use" endorsement which excluded coverage for the tractor "while used in the business of anyone to whom the [tractor] is rented" and provided that "an insured does not include anyone engaged in the business of transporting property . . ." This type of policy is commonly known as a "bobtail" policy and provides liability insurance coverage for a leased tractor when the tractor is being used for the lessor's personal purposes. *Reeves v. B & P Motor Lines, Inc.*, 82 N.C. App. 562, 346 S.E.2d 673 (1986). By the arguments in their briefs, the parties agree that the issue, therefore, is whether, as a matter of law, Butterfield was driving the tractor "in the business of" MGM at the time of the accident. If Butterfield was driving "in the business of" MGM, the exclusion in Northland's policy applies and Liberty Mutual's policy provides coverage; if he was not driving "in the business of" MGM, Northland's policy provides coverage. We hold that Butterfield was driving "in the business of" MGM at the time of the accident and affirm the entry of summary judgment in favor of defendant Northland.

Our Court has previously construed insurance contract language such as that used in the exclusionary clause contained in Northland's "Truckers—Insurance for Non-Trucking Use" endorsement using *respondeat superior* principles. *McLean Trucking Co. v. Occidental Fire & Casualty Co.*, 72 N.C. App. 285, 324 S.E.2d 633, *disc. review denied*, 313 N.C. 603, 330 S.E.2d 611 (1985). Thus, the question is whether the driver is acting within the scope of the business of the lessee, MGM, at the time of the accident. "It is axiomatic that in order to predicate liability under this doctrine the employee would have to be within the scope of employment, furthering the business of the employer at the time of the accident, therefore, 'in the business of' the lessee." *Id.* at 291, 324 S.E.2d at 636; see also *Reeves*, 82 N.C. App.

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562, 346 S.E.2d 673 (bob-tail coverage not applicable when tractor is used "in the business of lessee").

The primary inquiry in determining vicarious liability under the doctrine of *respondeat superior* is whether the principal retains the right to control and direct the details of the work. *Vaughn v. Department of Human Resources*, 296 N.C. 683, 252 S.E.2d 792 (1979). Where an employer retains the right to control and direct the details of the work, the employee's acts done in furtherance of the employer's business may be said to have been done in the scope of employment, or in the context of this case, "in the business of" the employer. It is a general rule that an employee is not engaged "in the business of" the employer while driving to and from the place of employment. *McLean, supra*. However, where the employee is acting at the direction of, or in the performance of some duty owed to, the employer when making the trip, the employee may be said to be acting in the scope of employment. See *Powers v. Lady's Funeral Home*, 306 N.C. 728, 295 S.E.2d 473 (1982) (worker's compensation case where employee injured while returning to his home while on-call; held injury compensable as occurring within course and scope of employment); *Evington v. Forbes*, 742 F.2d 834 (4th Cir. 1984) (applying North Carolina law and holding employee returning to work while on "call-back" status was acting within scope of employment).

In the present case, the undisputed facts are that Butterfield, as the driver of the truck, was required by MGM to keep the leased tractor at his home, rather than at MGM's terminal. When he was on-call, he was required to be in readiness to go to the terminal to pick up a load. Before proceeding to the terminal, he was required to perform pre-trip inspections and maintenance on the tractor. When the tractor was not needed for MGM's purposes, Butterfield was permitted to use it for personal errands. On the date of the accident, Butterfield was on-call and had received instructions from MGM to bring the tractor into the terminal to pick up a shipment. Unlike the driver in *McLean*, who was en route to his home at his own election rather than at the instruction of his dispatcher, Butterfield was, at the time of the accident, acting upon instructions from MGM in driving the tractor to the terminal. These facts, even viewed in the light most favorable to plaintiffs, establish as a matter of law that Butterfield was acting in furtherance of the business of MGM. Therefore, we hold the tractor was being used "in the business of" MGM at the time of the accident, and Northland's policy provides no coverage for the accident of 3 August 1994. Summary judgment for defendant Northland is affirmed.

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[128 N.C. App. 432 (1998)]

Affirmed.

Judges JOHN and SMITH concur.

STATE OF NORTH CAROLINA v. CURTIS BALDWIN SHOFF

No. COA97-134

(Filed 20 January 1998)

**Criminal Law § 560 (NCI4th Rev.)— driving while impaired—
mistrial—adverse weather conditions**

The trial court did not abuse its discretion in declaring a mistrial in a DWI prosecution based upon findings that there were three to six inches of snow in the county, that several jurors were unable to return to the courthouse for the second day of the trial due to the adverse weather conditions, and that defendant's attorney informed the court that it would be difficult for him to get to court. Therefore, the subsequent trial of defendant before another jury did not constitute double jeopardy.

Appeal by defendant from order entered 23 February 1994 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 9 October 1997.

*Attorney General Michael F. Easley, by Isaac T. Avery, III,
Special Deputy Attorney General, for the State.*

Wade Hall, for defendant-appellant.

McGEE, Judge.

Defendant was charged with driving while impaired (DWI) in violation of N.C. Gen. Stat. § 20-138.1 (1993) on 6 February 1993. Defendant pled not guilty but was convicted of DWI in the District Court of Buncombe County on 17 November 1993. Defendant appealed to Buncombe County Superior Court and his trial began on 3 January 1994. A jury was empaneled and two witnesses testified for the State. At the end of the day, the trial court recessed until 4 January 1994. However, during the evening of January 3, it snowed three to six inches resulting in several jurors being unable to return on January 4 for defendant's trial. In addition, defendant's attorney

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called the court and stated it would be difficult for him to return to court. As a result, a mistrial was declared and the case was rescheduled for 6 January 1994.

At the January 6 trial, defendant objected to the new jury and moved to dismiss the DWI charge based upon double jeopardy arguments. Defendant's motion was denied and the case was continued until 23 February 1994 when the defendant was again convicted of driving while impaired. At the sentencing hearing, defendant again moved to dismiss based on double jeopardy arguments and filed a motion for appropriate relief. Both motions were denied.

The defendant's main assignment of error is that the trial court erred in declaring a mistrial thereby subjecting the defendant to double jeopardy. We disagree.

This Court has long recognized that a defendant has the "valued right" to have his trial concluded before a particular court and that this right is guaranteed by the double jeopardy prohibition of the United States Constitution. *State v. Jones*, 67 N.C. App. 377, 380, 313 S.E.2d 808, 811 (1984). As stated in the United States Supreme Court decision, *Arizona v. Washington*, 434 U.S. 497, 503-05, 54 L. Ed. 2d 717, 727-28 (1978):

The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

(Footnotes omitted). Furthermore, "[i]t has long been a fundamental principle of the common law of North Carolina that no person can be twice put in jeopardy of life or limb for the same offense." *State v. Lachat*, 317 N.C. 73, 82, 343 S.E.2d 872, 876 (1986).

While the principle of double jeopardy remains an underlying consideration in any criminal proceeding, "[t]he decision to order a mistrial lies within the discretion of the trial judge." *State v. Odom*,

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316 N.C. 306, 309, 341 S.E.2d 332, 334 (1986). Our Supreme Court has held that “the [double jeopardy] principle is not violated where a defendant’s first trial ends with a mistrial which is declared for a manifest necessity or to serve the ends of public justice.” *Lachat* at 82, 343 S.E.2d at 877. The exercise of this discretion is governed by N.C. Gen. Stat. § 15A-1063 and 1064 (1988). In essence, “upon his own motion, a judge may declare a mistrial if . . . [i]t is impossible for the trial to proceed in conformity with law.” N.C.G.S. § 15A-1063. “Before granting a mistrial, [however] the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case.” N.C.G.S. § 15A-1064.

The purpose of requiring findings of fact is “clearly to ensure that mistrial is declared only where there exists real necessity for such an order.” *Jones* at 382, 313 S.E.2d at 812. This concept has been interpreted to mean that “where a defendant insists on his right to have his trial completed before one jury, that right may only be denied after the demonstrated exercise of careful judicial inquiry and deliberation.” *Id.* at 384, 313 S.E.2d at 813.

In the case before us, the trial court satisfactorily complied with this mandate. Included in the record were the trial court’s findings of fact that there were three to six inches of snow in the county, that several of the jurors were unable to get to the courthouse due to the adverse weather conditions, and that defendant’s attorney informed the court it would be difficult for him to get to court.

Since the decision to declare a mistrial is within the trial court’s discretion, the decision will not be disturbed unless it is “manifestly unsupported by reason,” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985), or it is “so arbitrary that it could not have been the result of a reasoned decision.” *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985); *State v. Parker*, 315 N.C. 249, 258-59, 337 S.E.2d 497, 502-03 (1985). Due to the adverse weather conditions and the effect that these conditions had on both the jurors’ and the attorney’s ability to physically get to court for the second day of trial, we do not find the trial court’s decision to declare a mistrial was an abuse of his discretionary power.

Defendant’s remaining arguments deal with whether or not the trial judge erred in denying defendant’s motions to dismiss at the start and conclusion of the second trial. The motions made were based on the double jeopardy argument discussed above. Having found no error in the trial court’s decision to declare a mistrial, we

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further find no error in the trial court's denial of defendant's motions to dismiss.

The trial court did not err in declaring a mistrial or in denying defendant's motions to dismiss.

Affirmed.

Judges LEWIS and MARTIN, John C., concur.

HILDA McCARN, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF TERRY McCARN, DECEASED, AND JACK McCARN, PLAINTIFFS V. KEN BEACH, CHIEF OF THE GASTON COUNTY POLICE DEPARTMENT; TOMMY FULLER AND DOUGLAS IVEY, INDIVIDUALLY, AND IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE GASTON COUNTY POLICE EMERGENCY RESPONSE TEAM, AND GASTON COUNTY, A NORTH CAROLINA MUNICIPALITY, DEFENDANTS

No. COA97-582

(Filed 20 January 1998)

**Sheriffs, Police, and Other Law Enforcement Officers § 13
(NCI4th)— police officers—individual capacities—insufficient allegations—public officer immunity**

In an action resulting from the death of plaintiffs' son, plaintiffs' complaint failed to state a claim against defendant police officers in their individual capacities and should have been dismissed based on the doctrine of public officer immunity where the allegations of the complaint focus on defendants' negligence only in their official capacities; the only mention of suing the officers as individuals is found in the caption of the complaint; and there are no allegations of malice, corruption, or that the officers were acting outside the scope of their official authority.

Appeal by defendants from order entered 13 January 1997 by Judge Jesse B. Caldwell, III, in Gaston County Superior Court. Heard in the Court of Appeals 4 December 1997.

DeVore & Acton, P.A., by Fred W. DeVore, III, for plaintiff appellees.

Womble Carlyle Sandridge & Rice, by G. Michael Barnhill and W. Clark Goodman, for defendant appellants.

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SMITH, Judge.

On the morning of 10 July 1993, decedent Terry McCarn ("Terry") and his father Jack McCarn ("Jack") were visiting the home of Terry's brother Mike McCarn ("Mike"). Terry, a 47-year-old functioning at an IQ of 62, lived with his parents. Terry's brother Mike lived in a house approximately 150 yards away from the parents.

That morning, Terry became upset because his brother and father were doing some plumbing repairs without him. Terry demanded that his father return with him to their house. Terry was carrying a double-barreled shotgun at the time. After they left, Mike called 911 explaining that his brother was suffering from a mental disability and had a gun pointed at their dad.

During the walk home, Terry fired the shotgun twice into some trees and told his dad that it "should teach you a lesson." Soon thereafter, Officer J. D. Costner arrived at the McCarn house and Jack asked him to help take Terry to the hospital for treatment. The officer called to Terry's mother Hilda McCarn ("Hilda") and requested she come outside. Repeated attempts to communicate with Hilda and Terry received no response. Subsequently, more officers arrived on the scene and were advised it was a hostage situation.

Eventually, Hilda left the house. However, further attempts to contact Terry were unsuccessful. Approximately three hours after arriving at the house, the police had electricity to the house cut off in an attempt to drive Terry outside. The officers still received no response. Officers warned Terry that they were going to introduce pepper gas into the house, but again received no communication from him.

Approximately four hours after their arrival, officers deployed pepper gas. Eventually, Terry emerged from the house carrying a shotgun. Terry walked around the house and pointed his shotgun at Officer Harris, who was only a few feet away. Officer Harris, Officer Isenhour, and Terry all fired their weapons. Terry died from multiple gunshot wounds.

Plaintiffs brought a suit alleging claims in federal court pursuant to 42 U.S.C. § 1983 and also state negligence claims. Subsequently defendants' summary judgment motion as to all of plaintiffs' claims under 42 U.S.C. § 1983 was allowed, but the federal court declined to exercise supplemental jurisdiction over plaintiffs' state law claims.

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Plaintiffs appealed that decision and the Fourth Circuit Court of Appeals affirmed in an unpublished opinion.

On 30 August 1996, plaintiffs filed this action, alleging state claims of negligence, gross negligence, negligent intentional infliction of emotional distress, and property damage. On 4 November 1996, defendants filed a motion to dismiss all claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), and (6), based on lack of jurisdiction over the subject matter, lack of jurisdiction over the person, and for failure to state a claim upon which relief may be granted. Judge Jesse B. Caldwell, III, denied the motion to dismiss. Defendants appeal.

In general, the denial of a motion to dismiss is interlocutory and thus not immediately appealable. *Anderson v. Town of Andrews*, 127 N.C. App. 599, 601, 492 S.E.2d 385, 386 (1997). However, if immunity is raised as a basis in a motion for summary adjudication, a substantial right is affected and the denial is immediately appealable. *Id.* The standard of review on a motion to dismiss involves a determination of whether, as a matter of law, the complaint, treating its allegations as true, is sufficient to state a claim upon which relief may be granted. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

The first issue on appeal is whether the trial court erred in denying defendants' motion to dismiss all claims against the officers in their individual capacities based on public officer immunity. The general rule of official immunity is that a public officer who exercises his judgment and discretion within the scope of his official authority, without malice or corruption, is protected from liability. *Golden Rule Ins. Co. v. Long*, 113 N.C. App. 187, 194, 439 S.E.2d 599, 603, *appeal dismissed and disc. review denied*, 335 N.C. 555, 439 S.E.2d 145 (1993). In order to hold an officer personally liable in his individual capacity, a plaintiff must make a *prima facie* showing that the officer's conduct is malicious, corrupt, or outside the scope of his official authority. *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 205, 468 S.E.2d 846, 852, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996).

The caption of a case is not determinative of whether a defendant is being sued in his individual or official capacity. *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 279 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). Furthermore,

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[i]f the plaintiff fails to advance any allegations in his or her complaint other than those relating to a defendant's official duties, the complaint does not state a claim against a defendant in his or her individual capacity, and instead, is treated as a claim against defendant in his official capacity.

Trantham v. Lane, 127 N.C. App. 304, 307, 488 S.E.2d 625, 628 (1997) (citations omitted).

In the instant case, the allegations of the complaint focus on defendants' negligence only in their official duties as law enforcement officers. The complaint fails to state a claim against the defendants in their individual capacities as there are no allegations of malice, corruption, or that the officers were acting outside the scope of their official authority. *Epps*, 122 N.C. App. at 205, 468 S.E.2d at 852; *Trantham*, 127 N.C. App. at 307, 488 S.E.2d at 627. The only mention of suing the officers as individuals is found in the caption and not in the body of the complaint. Plaintiffs even allege in their complaint that at all times defendants were acting within the scope of their employment. Because all claims alleged against defendants are in their official capacities, they are protected from liability by their official immunity.

The trial court erred by denying the motion to dismiss based on public officer immunity. Thus, we reverse and remand this case for entry of an order granting the motion to dismiss. In light of the foregoing reasoning, we need not address defendants' other assignments of error.

Reversed and remanded.

Judges MARTIN, John C., and JOHN concur.

ROUSSELO v. STARLING

[128 N.C. App. 439 (1998)]

GARY J. ROUSSELO, PLAINTIFF V. WILLIAM J. STARLING, IN HIS OFFICIAL CAPACITY AND HIS INDIVIDUAL CAPACITY, DEFENDANT

No. COA97-304

(Filed 3 February 1998)

1. Appeal and Error § 118 (NCI4th)— summary judgment denied—§ 1983 action—qualified immunity defense—immediately appealable

A highway patrolman's appeal from the denial of his summary judgment motion on plaintiff's 42 U.S.C. § 1983 claim arising from a traffic stop was immediately appealable where defendant raised the qualified immunity defense.

2. Appeal and Error § 122 (NCI4th)— traffic stop and drug search—summary judgment granted on two claims—denied on one—immediately appealable

Plaintiff's appeal of a summary judgment for a highway patrol trooper on plaintiff's claims for false imprisonment and violation of his state constitutional rights arising from a traffic stop was immediately appealable where plaintiff's claims arose from the same transaction as a § 1983 action for which summary judgment was denied and the possibility of inconsistent verdicts existed.

3. Appeal and Error § 341 (NCI4th)— assignment of error—contention not included—not considered

Defendant's contention that a § 1983 claim against him in his official capacity was improper because § 1983 only permits claims against a person was not the subject of a proper assignment of error and was not reviewed. N.C.R. App. P. 10(a).

4. Sheriffs, Police, and Other Law Enforcement Officers § 23 (NCI4th)— traffic stop and drug search—§ 1983 claim—qualified immunity

The trial court erred in not granting a highway patrol trooper's motion for summary judgment based on qualified immunity in a § 1983 claim which arose from a traffic stop, a discrepancy between plaintiff's rental agreement and the car tag, and a dog sniff for drugs. Plaintiff's right to be free from an unlawful detention and search was clearly established, but the initial stop for speeding did not violate any of his rights, the discrepancy between the rental agreement and the license tag was sufficient reason to investigate the situation, confirmation that plaintiff was

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properly in possession of the vehicle was not made until after the dog alerted to the presence of drugs, which gave the trooper probable cause to search the vehicle, there is not a sufficient indication of a lack of diligence on the part of the trooper to support a finding that the detention was too long, and, assuming any irregularities in the dog sniff, there was no evidence that the trooper was aware or should have been aware of the irregularity. A reasonable person in the trooper's position would not have known that his actions violated a clearly established right and he is therefore entitled to the defense of qualified immunity.

5. Constitutional Law § 98 (NCI4th)— traffic stop and drug search—state constitution—civil claims—adequate remedies

The trial court properly granted summary judgment for a highway patrol trooper on state constitutional claims for unreasonable detention, search, and seizure arising from a traffic stop and drug search where there were adequate state remedies.

6. False Imprisonment § 4 (NCI4th)— traffic stop and drug search—no illegal restraint

The trial court did not err by granting summary judgment for defendant-highway patrol trooper on a claim for false imprisonment arising from a traffic stop and drug search where the trooper did not illegally restrain plaintiff.

Appeals by plaintiff and defendant from order entered 19 December 1996 by Judge Julius A. Rousseau, Jr., in Wilkes County Superior Court. Heard in the Court of Appeals 28 October 1997.

Attorney General Michael F. Easley, by Special Deputy Attorney General Isaac T. Avery, III, and Assistant Attorney General Jonathan P. Babb, for the defendant.

Elliot, Pishko, Gelbin & Morgan, P.A., by Robert M. Elliot, and Deborah K. Ross, for the plaintiff.

WYNN, Judge.

This case arises from a stop and search of Gary J. Rousello's vehicle on 3 August 1992 by a North Carolina State Highway Patrolman, William J. Starling. In this appeal, Trooper Starling first contends that the trial court erroneously failed to grant summary judgment for him on Rousello's claim for an alleged violation of his constitutional

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rights to be free from unlawful search and seizure. We agree and conclude that under the doctrine of qualified immunity Trooper Starling was immune from suit because a reasonable person in his position would not have known that his actions violated a clearly established right. Secondly, Rousselo contends that the trial court erred by granting summary judgment in favor of Trooper Starling on Rousselo's claim for a direct violation of his state constitutional right to be free from unlawful search and seizure. In North Carolina, a direct claim for an alleged violation of a constitutional right is allowed only where there is not an adequate remedy provided by state law. Because the common law claims of false imprisonment and trespass to chattels provide an adequate remedy, we hold that the trial court did not err by dismissing the claim. Finally, we also conclude that the trial court did not err in dismissing Rousselo's claim for false imprisonment because the evidence before the trial court did not show that an illegal restraint had occurred.

The record shows that Rousselo, a resident of California, worked on a film in Tennessee until his job ended on 2 August 1992. The next day, he drove a car that he rented in Tennessee into North Carolina. At approximately 2:10 p.m. on Highway 421 in Wilkes County, Trooper Starling stopped him for driving 70 m.p.h. in a 55 m.p.h. zone.

Thereafter, Rousselo presented his California driver's license and his rental car agreement to Trooper Starling. On the rental agreement from Thrifty Car Rental, the rental car tag number was listed as TF0355. The tag on the rental car, however, was ZLN697. Shortly after stopping him, Trooper Starling asked Rousselo to sit in the patrol vehicle, and Rousselo did so.

For approximately the next twenty minutes, Trooper Starling questioned Rousselo about his background, where he was going, and his occupation. In his deposition, Trooper Starling stated that Rousselo was "evasive" and seemed "real uneasy as he sat there and talked to me, real jittery, real nervous. To me, he seemed more nervous than usual."

Trooper Starling called for backup at 2:34 p.m. Two officers were dispatched. While waiting on backup, Trooper Starling requested several record checks from the State Highway Patrol dispatcher. He called for verification of Rousselo's license, which he received. He also had a check run with the El Paso, Texas Intelligence Center ("EPIC") to determine if Rousselo had been involved with drug trafficking. At 2:42 p.m. the center responded that they had no informa-

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tion on him. During this time he also continued to ask Rousselo questions, and he asked for consent to search Rousselo's vehicle, which was refused.

Trooper Starling's backup, Sergeant Pate and Sergeant Bullock, arrived at 2:50 p.m. The officers conferred amongst themselves and inspected the vehicle from the outside. At 3:02 p.m., the officers requested a canine unit from the Wilkes County Sheriff's Department. At 3:04 p.m., the dispatcher called the car rental company to determine if Rousselo had rented the vehicle.

A Wilkes County deputy arrived with a drug dog at 3:15 p.m. A few minutes after he arrived, the deputy informed the officers that the dog alerted to the presence of drugs. Also at 3:15 p.m., Thrifty Car Rental informed the dispatcher that Rousselo did rent the vehicle. From the time of the alert until 3:47 p.m., Trooper Starling searched Rousselo's car and his suitcase. No contraband was found. After the search was completed, Trooper Starling was informed of the confirmation from Thrifty. At 3:47, the deputy and the dog left the scene. Shortly thereafter, Rousselo left, followed by Trooper Starling at 3:49 p.m. From the time of the initial stop until the troopers left, a total of 99 minutes elapsed. Rousselo was cited for driving 70 m.p.h. in a 55 m.p.h. zone, and he waived his court appearance and paid the fine and court costs.

On 25 July 1995, Rousselo filed in Wake County a complaint against Trooper Starling in his official and individual capacity and against several other defendants, including the State of North Carolina and the North Carolina State Highway Patrol. The complaint raised three claims for relief arising from the stop and search: one for violation of 42 U.S.C. § 1983, another for a violation of the North Carolina State Constitution, and the third for false imprisonment. On a motion for change of venue by Trooper Starling, the action was transferred to Wilkes County. The claims against the defendants other than Trooper Starling were dismissed for failure to state a claim. On 17 September 1996, Trooper Starling moved for summary judgment. On 19 December 1996, Judge Julius A. Rousseau, Jr., denied the motion for summary judgment as to the section 1983 claim, and granted it as to all remaining claims. From this order, both parties appeal.

I.

[1] Although not discussed by either party in the briefs, we first must consider the interlocutory nature of these appeals.

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"An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995). Furthermore, "[a] grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). There are a few exceptions to this rule, one of which is that an interlocutory order can be appealed if the trial court's order deprives the appellant of a substantial right which would be lost absent immediate review. *See Page*, 119 N.C. App. at 734, 460 S.E.2d at 334 (citing N.C. Gen. Stat. §§ 1-277(a), 7A-27(d)(1)).

Trooper Starling appeals the denial of his motion for summary judgment on the section 1983 claim, and asserts on appeal the defense of qualified immunity. In *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992), our Supreme Court held that "a denial of a summary judgment motion is normally not immediately appealable; however, under the case of *Mitchell v. Forsyth*, 472 U.S. 511, 86 L. Ed. 2d 411 (1985), when a motion for summary judgment based on immunity defenses to a section 1983 claim is denied, such an interlocutory order is immediately appealable before final judgment." *Id.* at 767, 413 S.E.2d at 280. Therefore, because Trooper Starling's motion raised the qualified immunity defense its denial affects a substantial right and is immediately appealable.

[2] Mr. Rousselo's appeal raises a more complicated question. He appeals a decision that defeated two of three claims that arose from the same factual situation.

Our Supreme Court has held that the right to avoid two trials on the same issue may be a substantial right. *Green v. Duke Power Co.*, 305 N.C. 603, 608, 290 S.E.2d 593, 596 (1982). The Court stated that "the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Id.*

This Court has interpreted the language of *Green* and subsequent cases as creating a two-part test to see if a substantial right is affected. A party is required to show that (1) the same factual issues would be present in both trials and (2) the possibility of inconsistent

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verdicts on those issues exists. *Moose v. Nissan of Statesville*, 115 N.C. App. 423, 426, 444 S.E.2d 694, 697 (1994).

In this case, as all three of Rousselo's claims arose from the same transaction, the first element is met. The second element is also met because one jury could hear the facts for the section 1983 claim and rule one way while another jury could hear the same set of facts for the second two claims and rule differently, even though all three claims are based on the same facts. Accordingly, a substantial right is affected and Rousselo's appeal, although interlocutory, is properly before us.

Before turning to the merits of the appeal, we note that in *Jeffreys v. Raleigh Oaks Joint Venture*, we said that “[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.” 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). Failure to make this showing subjects an appeal to dismissal. *Id.* Although we have decided to consider this appeal notwithstanding the lack of a showing, we caution appellants to remember its necessity in the future.

II.

[3] We first consider Trooper Starling's appeal, which presents the question of whether the trial court erred by not granting summary judgment in his favor on the section 1983 claim. Rousselo's complaint raised a claim against Trooper Starling in both his individual and official capacities.

Trooper Starling first contends that a section 1983 claim against him in his official capacity is improper because section 1983 only permits actions against persons, and a state official sued in his official capacity is not a person within the meaning of section 1983. We note, however, that his sole assignment of error was as follows:

[Trooper Starling] is entitled to *qualified immunity* on the plaintiff's first claim for relief based upon 42 U.S.C. § 1983 and the trial court erred in failing to grant his motion for summary judgment on this claim.

(emphasis added). Thus, as Trooper Starling's contention was not the subject of a proper assignment of error, we are unable to review it.

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See N.C.R. App. P. 10(a) (“[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal.”). Accordingly, we do not consider the issue of whether the trial court erred as to the denial of summary judgment on the section 1983 claim against Trooper Starling in his official capacity.

[4] We next turn to the section 1983 claim against Trooper Starling in his individual capacity. Trooper Starling’s brief focuses on whether he was immunized from suit under the doctrine of qualified immunity; accordingly, we focus our review on that issue.

When state government officials are sued in their individual capacities for damages under section 1983, they may assert the defense of qualified immunity. *Corum*, 330 N.C. at 772, 413 S.E.2d at 283. Police officers sued under section 1983 are not protected by qualified immunity if the officers’ conduct violated “‘clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Lee v. Greene*, 114 N.C. App. 580, 585, 442 S.E.2d 547, 550 (1994) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 410 (1982)).

When ruling on the defense of qualified immunity, this Court must: (1) identify the specific right allegedly violated; (2) determine whether the right allegedly violated was clearly established at the time of the violation; and (3) if the right was clearly established, determine whether a reasonable person in the officer’s position would have known that his actions violated that right. *Barnett v. Karpinos*, 119 N.C. App. 719, 725, 460 S.E.2d 208, 211, *disc. review denied*, 342 N.C. 190, 463 S.E.2d 232 (1995). The first two determinations are questions of law. *Lee v. Greene*, 114 N.C. App. at 585, 442 S.E.2d at 550. However, the third question is one of fact, and requires a factfinder to resolve disputed aspects of the officer’s conduct. *Id.* Summary judgment is not appropriate if there are disputed questions of fact concerning the officer’s conduct. *Id.*

The specific right alleged to be violated was Roussello’s right to be free from unreasonable searches and seizures as a result of his continued detention after the initial stop for speeding and for the subsequent search of his vehicle and possessions. The right to be free from an unlawful detention and search was clearly established at the time of the incident, as the right is protected by both the federal and state constitutions and has been the subject of a vast body of both federal and state case law.

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We next turn to the major point of contention between the parties—whether a reasonable person in the position of Trooper Starling would have known that his actions violated these rights. Obviously, the initial stop for speeding did not violate any of Rousselo's rights. Once the vehicle was stopped, the discrepancy between the rental agreement and the vehicle's actual license tag was sufficient reason to investigate the situation. Confirmation that Rousselo was properly in possession of the vehicle was not made until after the canine unit arrived and the dog alerted to the presence of drugs, giving Trooper Starling probable cause to search the vehicle. *See State v. McDaniels*, 103 N.C. App. 175, 189-90, 405 S.E.2d 358, 367-68 (1991), *aff'd on other grounds*, 331 N.C. 112, 413 S.E.2d 799 (1992) (per curiam).

Rousselo argues that Trooper Starling did not have the required reasonable suspicion to detain him prior to the dog sniff. We disagree, and hold that on the facts of this case the discrepancy between the rental agreement and the vehicle's license tag did furnish the requisite reasonable suspicion to detain the vehicle. We further disagree with Rousselo's contention that the length of the detention was "presumptively illegal." On the facts before the trial court, there is not a sufficient indication of a lack of diligence on the part of Trooper Starling to support a finding that the detention was too long. Finally, any irregularities surrounding the dog sniff are irrelevant, assuming *arguendo* that an irregularity was present, as there was no evidence that Trooper Starling was or should have been aware of any such irregularity. Accordingly, we conclude that Rousselo's constitutional rights were not violated. And, in the context in which the parties have presented this issue, we hold that as a result, a reasonable person in Trooper Starling's position would not have known that his actions violated a clearly established right. Therefore, he is entitled to the defense of qualified immunity and the trial court erred in not granting his motion for summary judgment on this point.

III.

[5] We next turn to Rousselo's appeal and consider whether the trial court correctly granted summary judgment against Rousselo on his claims for violations of the North Carolina State Constitution. Because there are adequate state law remedies for his claims, we hold that the trial court properly granted summary judgment.

In *Corum*, our Supreme Court held that an individual whose state constitutional rights have been abridged has a direct action for monetary damages against a state official in their official, but not individ-

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ual, capacity, if there is no adequate remedy provided by state law. *Corum*, 330 N.C. at 783-87, 413 S.E.2d at 290-92.

In this case, Rousselo pled that Trooper Starling violated his rights “to be free from unreasonable detention, search and seizure, as guaranteed by Article I, sections 19 and 20 of the North Carolina Constitution.” He argues that the trial court erred in granting summary judgment because there is not an adequate state law remedy for the alleged violations.

As to Rousselo’s constitutional claim for unreasonable detention and seizure by a state official, the issue of whether there is a direct cause of action under *Corum* for such a claim has already been decided against him. We have previously held that “an attempt to vindicate [a plaintiff’s] right to be free from restraint . . . is the same interest protected by his common law claim for false imprisonment. Plaintiff’s claim for false imprisonment, if successful, would have compensated him for the same injury he claims in his direct constitutional action.” *Alt v. Parker*, 112 N.C. App. 307, 317-18, 435 S.E.2d 773, 779 (1993), cert. denied, 335 N.C. 766, 442 S.E.2d 507 (1994).

In *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 449 S.E.2d 240 (1994), disc. review denied, 339 N.C. 737, 454 S.E.2d 648 (1995), the record showed that the plaintiff had been drinking at a bar with some friends. *Id.* at 666, 449 S.E.2d at 242. After leaving the bar, she was walking near the police station when she tripped and fell. *Id.* Two officers then approached her, and after a brief conversation they took her to jail. *Id.* at 667, 449 S.E.2d at 243. She was released the next morning. *Id.* at 668, 449 S.E.2d at 243. One of the claims that she brought was a direct cause of action under the state constitution. *Id.* at 675, 449 S.E.2d at 247. We held that she had an adequate state remedy, because her “constitutional right not to be unlawfully imprisoned and deprived of her liberty are adequately protected by her common law claim of false imprisonment, which protects her right to be free from unlawful restraint. If plaintiff’s false imprisonment claim is successful, she will be compensated for the injury she claims in her direct constitutional claim.” *Id.* at 675-76, 449 S.E.2d at 248. (citations omitted). As a result, she could not bring a direct constitutional claim for her detention. *See id.*

In light of *Alt* and *Davis*, Rousselo’s argument that he should have a direct constitutional claim for unreasonable detention and seizure fails. Because state law provides an adequate alternate

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remedy, we hold that the trial court did not err in granting summary judgment on these claims. We next turn to his argument that there is a direct constitutional claim for an unreasonable search by a state official.

In *State v. Carter*, 322 N.C. 709, 712-13, 370 S.E.2d 553, 554 (1988), our Supreme Court pointed out that Article I, Section 20 of North Carolina's Constitution provides that individuals shall not be subject to unreasonable searches and seizures by the government. However, the common law action for trespass to chattel provides a remedy for an unlawful search. See *McDowell v. Davis*, 33 N.C. App. 529, 534-35, 235 S.E.2d 896, 900, *appeal dismissed and disc. review denied*, 293 N.C. 360, 237 S.E.2d 848 (1977), *overruled on other grounds*, *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990).

Rousselo first contends that such a common law remedy is inadequate because he could not assert his claim against the State of North Carolina. He bases this argument on the premise that an action against a state official in their official capacity is essentially an action against the State. Because common law immunity would defeat any common law tort claim that he brought against the State, he argues there is no adequate state law remedy for his claim and therefore he is entitled to bring a claim under the North Carolina Constitution.

We find no merit to this argument. *Corum* did not hold that there had to be a remedy against the State of North Carolina in order to foreclose a direct constitutional claim. We agree with Trooper Starling that the existence of an adequate alternate remedy is premised on whether there is a remedy available to plaintiff for the violation, not on whether there is a right to obtain that remedy from the State in a common law tort action. Furthermore, we have implicitly held otherwise in *Alt*, where the existence of the common law tort of false imprisonment foreclosed a direct constitutional claim against the State. See *Alt v. Parker*, 112 N.C. App. 307, 317-18, 435 S.E.2d 773, 779 (1993), *cert. denied*, 335 N.C. 766, 442 S.E.2d 507 (1994).

Rousselo also argues that a common law remedy is inadequate because in order to recover in a tort claim against Trooper Starling in his individual capacity, he will have to show that he acted with malice, corruption, or beyond the scope of his duty. See *Jones v. Kearns*, 120 N.C. App. 301, 306, 462 S.E.2d 245, 248, *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995). Because such a showing would

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require more evidence, he argues that the remedy is inadequate. We disagree.

Corum held that the common law provides a remedy where there is an “absence of an adequate state remedy,” because in the absence of such a remedy “the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right.” *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992), cert. denied, 506 U.S. 985, 121 L. Ed. 2d 411 (1985). In the present case, however, there is not an absence of a remedy—the common law action of trespass to chattel provides a remedy to the wrong of an unlawful search. See *McDowell*, 33 N.C. App. at 534-35, 235 S.E.2d at 900. We decline to hold that Rousselo has no adequate remedy merely because the existing common law claim might require more of him. As the common law remedy of trespass to chattel provides an adequate vindication of the right to freedom from unreasonable searches, we hold that the trial court did not err in granting summary judgment to Trooper Starling on this claim.

IV.

[6] We next turn to Rousselo’s contention that the trial court erred by granting Trooper Starling’s motion for summary judgment on his false imprisonment claim because when viewed in the light most favorable to the the evidence shows that Trooper Starling acted outside of the scope of official authority and in bad faith. We disagree.

In North Carolina, the elements of a false imprisonment claim are as follows: (1) the illegal restraint of plaintiff by defendant, (2) by force or implied threat of force, and (3) against the plaintiff’s will. *Fowler v. Valencourt*, 334 N.C. 345, 348-49, 435 S.E.2d 530, 532 (1993). However, Trooper Starling, as a member of the North Carolina State Highway Patrol, is a public officer. *State v. Powell*, 10 N.C. App. 443, 449, 179 S.E.2d 153, 158 (1971). “Public officers are absolutely immune from liability for discretionary acts when taken without a showing of malice or corruption.” *Young v. Woodall*, 119 N.C. App. 132, 136, 458 S.E.2d 225, 228 (1995), reversed on other grounds, 343 N.C. 459, 471 S.E.2d 357 (1996).

In this case, Rousselo argues that the length of the detention coupled with Trooper Starling’s delay in verifying his license and registration shows that Trooper Starling went beyond his official authority and that he acted in bad faith. We disagree. As we have previously

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discussed in relation to the section 1983 claim, on the facts before the trial court, Trooper Starling did not illegally restrain Rousselo. Accordingly, the facts do not make out the *prima facia* case for false imprisonment, and the arguments relating to the public immunity defense are irrelevant. Therefore, we hold that the trial court did not err in granting summary judgment on this claim.

In sum, we do not consider whether Trooper Starling is entitled to immunity in his official capacity because he did not assign that issue as an error for us to consider in this appeal; reverse and remand for entry of summary judgment in favor of Trooper Starling on Rousselo's section 1983 claim against Trooper Starling in his individual capacity; and affirm the trial court's grant of summary judgment against Rousselo on all other claims on appeal.

Reversed and remanded in part, affirmed in part.

Judges EAGLES and MARTIN, Mark D., concur.

DOROTHY JOHNSON AND PAULA SMITH, PLAINTIFF-APPELLANTS v. FIRST UNION CORPORATION AND/OR FIRST UNION MORTGAGE CORPORATION; KAY L. BAILEY; CIGNA PROPERTY & CASUALTY INSURANCE COMPANY AND/OR ESIS, INC.; ROBIN DEFFENBAUGH; INTERNATIONAL REHABILITATION ASSOCIATES, INC. (INTRACORP); AND PAT EDWARDS, R.N., DEFENDANT-APPELLEES

No. COA97-211

(Filed 3 February 1998)

1. Workers' Compensation § 57 (NCI4th)— fraud in claims settlement—Act not exclusive remedy

The exclusive remedy doctrine did not apply to bar plaintiffs' civil action for acts of fraud allegedly committed in the handling of plaintiffs' workers' compensation claims where the Industrial Commission's power to remedy the effects of fraud at the time the fraudulent acts allegedly occurred was limited to setting aside an agreement tainted by fraud pursuant to N.C.G.S. § 97-17; plaintiffs have alleged injuries beyond the mere loss of workers' compensation benefits, including emotional distress, and also seek punitive damages; and the remedy provided by N.C.G.S. § 97-17 thus does not adequately address plaintiffs' alleged injuries.

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2. Intentional Mental Distress § 2 (NCI4th)— refusal to pay insurance claim—sufficiency of complaint

Plaintiff employees' complaint properly alleged intentional infliction of emotional distress for defendant insurers' refusal to pay an insurance claim where plaintiffs' complaint alleged that defendants' "fraudulent misrepresentation and concealment of facts . . . were done with the intent to inflict anxiety and distress upon them."

3. Insurance § 1042 (NCI4th)— bad faith refusal to pay insurance benefits—statement of claim

The trial court erred in dismissing plaintiffs' claims against defendant insurers for bad faith refusal to pay insurance benefits to plaintiffs who alleged they became disabled due to a motion disorder while employed by defendant, First Union, where plaintiffs alleged that defendants materially altered a Form 21 agreement and produced an inaccurate video of plaintiffs' job duties to deceive plaintiffs' physicians that plaintiffs' injuries were not work-related.

4. Insurance § 11 (NCI4th)— unfair settlement statute—no individual claims

Plaintiffs' claim under the unfair insurance claim settlement statute, N.C.G.S. § 58-63-15(11), was properly dismissed because the statute creates a cause of action only in favor of the Insurance Commissioner.

5. Insurance § 11 (NCI4th)— workers' compensation—unfair or deceptive practice—statement of claim

Plaintiffs stated a claim for unfair or deceptive trade practices against defendant workers' compensation insurers where they alleged that defendants altered a Form 21 agreement and misrepresented plaintiffs' work duties to plaintiffs' physicians. N.C.G.S. §§ 58-63-15(11)i, 75-1.1.

6. Workers' Compensation § 57 (NCI4th)— fraud in settlement of claims—unfair practice action not barred

Alleged fraudulent conduct by defendant employer in the settlement of plaintiffs' workers' compensation claims did not fall within the scope of the employer-employee relationship governed by the Workers' Compensation Act where the fraudulent actions occurred after plaintiffs were no longer employed by defendant and did not relate to the accidents giving rise to the claims; thus,

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plaintiffs were not barred from bringing actions under the unfair or deceptive trade practices statute based upon such alleged fraud. N.C.G.S. § 75-1.1.

7. Conspiracy § 10 (NCI4th)— civil conspiracy—sufficiency of complaint

Plaintiffs stated a claim for civil conspiracy against defendant employer, defendant workers' compensation insurers, and their agents and employees where plaintiffs alleged that the employer and insurers, through their agents and employees, entered into a common agreement in furtherance of common objectives to fraudulently deprive plaintiffs of workers' compensation benefits and medical treatment and to defraud the Industrial Commission.

8. Workers' Compensation § 104 (NCI4th)— civil actions—stay pending workers' compensation determination—doctrine of primary jurisdiction

Plaintiffs' civil actions arising from the allegedly fraudulent handling of their workers' compensation claims by defendant employer, defendant compensation insurers, and their agents and employees will be stayed under the doctrine of primary jurisdiction pending the Industrial Commission's determination of plaintiffs' underlying workers' compensation claims.

Appeal by plaintiffs from order entered 18 September 1996 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 9 October 1997.

Charles R. Hassell, Jr., for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Robin K. Vinson, for defendant-appellees First Union Corporation, First Union Mortgage Corporation, and Kay L. Bailey.

Yates, McLamb & Weyher, L.L.P., by Derek M. Crump and Travis K. Morton, for defendant-appellees CIGNA Property & Casualty Insurance Company, Esis, Inc., Robin Deffenbaugh, International Associates, Inc., and Pat Edwards, R.N.

Maupin, Taylor & Ellis, P.A., by Elizabeth D. Scott, for defendant-appellees, International Rehabilitation Associates, Inc. (Intracorp), and Pat Edwards, R.N.

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McGEE, Judge.

Plaintiffs appeal from the granting of defendants' motions to dismiss pursuant to N.C.R. Civ. P. 12(b)(6). Plaintiffs' complaint alleged common law fraud, unfair or deceptive trade practices, intentional infliction of emotional distress, bad faith claims practices and civil conspiracy by defendant First Union Corporation and/or First Union Mortgage Corporation (employer) and defendants Cigna Property and Casualty Company and/or Esis, Inc., and International Rehabilitation Associates, Inc. (Intracorp) (collectively insurers), in connection with the handling of their workers' compensation claims.

In 1992 and 1993 plaintiffs separately filed claims with the North Carolina Industrial Commission (Commission) seeking workers' compensation benefits for injuries they allegedly sustained in the course of their employment with First Union as customer representatives in the Raleigh, North Carolina office. Specifically, plaintiffs allege that they developed a "repetitive motion disorder" affecting their hands, arms, shoulders, and neck. The record shows that the Commission has not yet issued an opinion and award for the claim of either plaintiff.

Viewing the facts in the light most favorable to the plaintiffs, the allegations in plaintiffs' complaint show that in August 1992 Smith signed a Form 21, which obligated the insurer to pay compensation to her "for an unlimited period of 'necessary' weeks." In September 1992, Smith received a copy of a letter by Robin Deffenbaugh (Deffenbaugh), claims adjustor for the insurers, stating that further medical treatment in her case was no longer authorized by insurers because Smith's physician had withdrawn his opinion that her injury was caused by activities performed in the course of her employment. Smith then obtained counsel, who upon investigation, informed her that the Form 21 Agreement she had signed was not contained in the Commission's file. Shortly thereafter, Smith advised the Commission of the insurers' failure to submit the executed Form 21 to the Commission for approval. By letter dated 3 March 1993 Smith was notified by the Commission that it had received a Form 21 which appeared to have been materially altered by defendants. The Commission also informed plaintiff that the possibility of fraud in connection with the alteration of the Form 21 could warrant the setting aside or the voiding of the Form 21. Plaintiff was further notified that defendants had failed to file other reports with the Commission required by law.

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Smith alleged in her complaint that:

defendants, through their agent and employee Deffenbaugh, with the intent to deceive plaintiff Smith, her attorney and the Industrial Commission, altered material terms of the Form 21 she had signed, by whiting out and changing its agreement to pay compensation for an unlimited period of "necessary" weeks, to "7 6/7" weeks, a limited period which conformed to the date her physician's diagnosis was canceled, and returned the altered Form 21 to the Industrial Commission for approval and filing.

Smith further alleged that by providing her physician with a videotape inaccurately depicting her work-related activities at First Union, the insurers intentionally misrepresented her work-related activities in order to cause her physician to withdraw his opinion that she was disabled. The videotape was produced by the insurers, through their agents and employees, Deffenbaugh and Pat Edwards, a rehabilitation nurse acting as the agent of all defendants in the provision of medical case management services to both plaintiffs in connection with their workers' compensation claims. According to plaintiffs, "[t]he video did not accurately illustrate the actual repetitive, high-speed activities plaintiffs and other CSRs had performed on a daily basis." Plaintiffs alleged that "defendants, through use of the inaccurate video . . . willfully deceived" plaintiffs and their physician, and as a result caused the physician to "withdraw his diagnosis that [plaintiffs'] injuries were work-related because [plaintiffs'] work activity as depicted in the video could not have caused a repetitive motion disorder." Smith also alleged that Edwards had "conspired with the employer and carrier in a plan to discredit her claim."

Johnson was first employed by First Union in the same office as Smith from 1986 to 1989, and later for eighteen months from June 1991 until January 1993. In January 1992 Johnson developed a repetitive motion disorder and later filed a claim with the Commission for disability arising from this disorder. In March 1993, by letter from the Commission, she learned that her claim had been rejected on the basis of the same inaccurate video previously sent to Smith's physician. In November 1993, insurers informed Johnson that based on the inaccurate videotape, her physician had withdrawn his diagnosis that her injury was work-related. Because of this, defendants would not voluntarily accept her claim for compensation and continued medical treatment. Johnson then joined Smith in filing the 25 March 1996 complaint on the basis that defendants acted with the intent to

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deceive her physician through use of a videotape which inaccurately portrayed the work-related duties of both she and Smith.

I. Exclusive remedy doctrine

[1] The first issue before this Court is whether the Workers' Compensation Act (Act) provides the exclusive remedy for acts of fraud committed in the handling of workers' compensation claims. We first examine the scope of the Commission's authority under the applicable statutes pertaining to fraud under the Act. *Charlotte-Mecklenburg Hospital Auth. v. N.C. Industrial Comm.*, 336 N.C. 200, 214, 443 S.E.2d 716, 725 (1994) (quoting *In re Community Association*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980) ("[T]he responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform.").

We note that the alleged fraudulent acts occurred prior to the General Assembly's enactment of the Workers' Compensation Reform Act of 1994, N.C. Gen. Stat. § 97-88.2 (1994); thus, this statute does not govern the case currently before this Court. N.C. Gen. Stat. § 120-20 (Cum. Supp. 1997) (acts of the General Assembly effective only after passage unless otherwise expressly directed). This statute required the Commission to "refer all cases of suspected fraud and all violations related to workers' compensation claims, by or against insurers or self-funded employers, to the Department of Insurance." N.C.G.S. § 97-88.2. The applicable statute, as amended in 1995, now confers this authority upon the Commission by requiring it to:

- (1) Perform investigations regarding all cases of suspected fraud and all violations related to workers' compensation claims, by or against insurers or self-funded employers, and refer possible criminal violations to the appropriate prosecutorial authorities;
- (2) Conduct administrative violation proceedings; and
- (3) Assess and collect civil penalties and restitution.

N.C. Gen. Stat. § 97-88.2 (Cum. Supp. 1997).

This case is governed by law as it existed prior to the passage of N.C. Gen. Stat. § 97-88.2. There was no comparable statute existing at the time the fraudulent acts allegedly occurred to empower the Industrial Commission to penalize insurers and employers for attempting to fraudulently deprive injured employees of their benefits. The Commission's power to remedy the effects of fraud involving

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“settlements made by and between the employee and the *employer*,” such as a Form 21 Agreement, was limited to setting aside the agreement tainted by fraud pursuant to N.C. Gen. Stat. § 97-17 (1991) (emphasis added). This statute provides that if there has been error due to fraud, misrepresentation, undue influence or mutual mistake, “the Industrial Commission may set aside such agreement.” N.C.G.S. § 97-17.

“[W]hen an *effective* administrative remedy exists, that remedy is exclusive.” See *Charlotte-Mecklenburg Hospital Authority*, 336 N.C. at 209, 443 S.E.2d at 722 (citations omitted). However, when the relief sought differs from the statutory remedy provided, the administrative remedy will not bar a claimant from pursuing an adequate remedy in civil court. *Id.* (holding that hospital’s action for injunctive relief from Workers’ Compensation statute not barred by exclusive remedy doctrine because relief sought differed from relief provided by Workers’ Compensation Act).

We hold that the remedy provided by N.C.G.S. § 97-17 is not effective as it does not adequately address the plaintiffs’ injuries. First, plaintiffs have alleged injuries beyond the mere loss of workers’ compensation benefits, including emotional distress arising from defendants’ fraudulent actions, see *Waddle v. Sparks*, 331 N.C. 73, 82, 414 S.E.2d 22, 27 (1992) (stating the three elements of an independent claim for emotional distress in negligent hiring and retention claims). They also seek punitive damages not provided for by N.C.G.S. § 97-17 which only empowers the Commission to set aside the tainted agreement. It is well-settled that the “punishment of . . . intentional wrongdoing,” including acts of fraud, is “well within North Carolina’s policy underlying its concept of punitive damages.” *Newton v. Insurance Co.*, 291 N.C. 105, 113, 229 S.E.2d 297, 302 (1976) (discussing availability of punitive damages in suit for bad faith refusal of insurer to pay claim). This Court has ruled it is error to dismiss a claim for punitive damages arising from a claim for bad faith refusal of insurer to pay benefits when the claim alleges that an insurer acted in “wilful, wanton and in conscious disregard of [its] duty to pay plaintiff’s insurance claim.” *Von Hagel v. Blue Cross and Blue Shield*, 91 N.C. App. 58, 62-63, 370 S.E.2d 695, 699 (1988).

For these reasons, we hold that N.C. General Statute § 97-17 is not an effective remedy for plaintiffs’ additional injuries beyond the loss of workers’ compensation benefits; thus, the exclusive remedy doctrine does not apply to bar plaintiffs’ civil action. See *Charlotte-*

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Mecklenburg Hosp. Auth., 336 N.C. at 209, 443 S.E.2d at 722 (discussing exclusive remedy doctrine).

II. Sufficiency of allegations

Next we examine whether, in viewing the plaintiffs' allegations as true, the plaintiffs have stated claims for which relief can be granted. *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 299-300, 435 S.E.2d 537, 541 (1993), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994) (discussing appellate review of 12(b)(6) motion).

a. Intentional infliction of emotional distress claim

[2] In order to survive a 12(b)(6) motion against an insurer for intentional infliction of emotional distress in refusing to pay an insurance claim, the complaint must allege that defendant insurer demonstrated "calculated intentional conduct causing emotional distress directed toward" the plaintiff. *Von Hagel*, 91 N.C. App. at 63, 370 S.E.2d at 699-700. Plaintiffs have met this requirement as they alleged that the defendants' "fraudulent misrepresentations and concealment of facts . . . were done with the intent to inflict anxiety and distress" upon them. Thus this claim was improperly dismissed.

b. Bad faith refusal of insurer to pay benefits

[3] To state a claim for bad faith refusal to pay insurance benefits, plaintiff must allege that the insurer has acted in bad faith by refusing to settle or negotiate with the plaintiff and that the insurers' actions have been a misuse of power and authority tantamount to outrageous conduct reflecting a reckless and wanton disregard of the plaintiff's rights under the insurance policy. *Dailey v. Integon Ins. Corp.*, 57 N.C. App. 346, 349, 291 S.E.2d 331, 332-33 (1982).

After reviewing plaintiffs' complaint, we hold that the allegations are sufficient to satisfy these requirements. The trial court erred in dismissing these claims for relief as the complaint contains allegations that the insurers materially altered the Form 21 agreement and produced an inaccurate video of plaintiffs' job duties to deceive plaintiffs' physicians that plaintiffs' injuries were not work-related. *Von Hagel*, 91 N.C. App. at 63, 370 S.E.2d at 699.

c. Unfair or Deceptive Trade Practices

[4] Plaintiffs also alleged that the "actions and conduct of defendants through their respective agents and employees . . . constitute unfair or deceptive trade practices as defined by N.C. Gen. Stat. § 58-63-15

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et seq. and 75-1.1 *et seq.*,” and as a result they “have sustained damages as a proximate result” of these practices. N.C. Gen. Stat. § 58-63-15(11) (1994) specifically states that it does not “of itself create any cause of action in favor of any person other than the [Insurance] Commissioner.” Accordingly, the claim for relief brought by the plaintiffs under this statute was properly dismissed. However, N.C. Gen. Stat. § 75-1.1 (1994) creates a “remedy ‘in the nature of a private action’ for the conduct described by and in [N.C. Gen. Stat.] § 58-63-15(11).” *Murray v. Nationwide Mutual Ins. Co.*, 123 N.C. App. 1, 10, 472 S.E.2d 358, 363 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172 (1997), *and disc. review denied*, 345 N.C. 344, 483 S.E.2d 173 (1997).

[5] N.C. General Statute § 58-63-15(11)i. (1994) states that to attempt “to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured” is an unfair claim settlement practice when “committ[ed] or perform[ed] with such frequency as to indicate a general business practice.” Case law has further required that for a plaintiff to prevail on a claim for unfair or deceptive trade practices, plaintiff must demonstrate the existence of three factors: “(1) an unfair or deceptive act or practice, or unfair method of competition, (2) in or affecting commerce, and (3) which proximately caused actual injury to the plaintiff or his business.” *Murray*, 123 N.C. App. at 9, 472 S.E.2d at 362 (citations omitted). When “an insurance company engages in conduct manifesting an inequitable assertion of power or position,” including conduct which can be characterized as “unethical,” that “conduct constitutes an unfair trade practice.” *Id.* In this case the alleged alteration of the Form 21 agreement and the misrepresentation of plaintiffs’ work duties to plaintiffs’ physicians by the insurer are actions which meet this definition. Thus the plaintiffs’ claim for relief on these grounds was improperly dismissed against the insurers.

[6] We next address whether a cause of action exists under N.C. Gen. Stat. § 75-1.1 *et seq.* against defendant employer. This Court has previously held that “employer-employee relationships do not fall within the intended scope of [N.C. Gen. Stat. § 75-1.1].” *Buie v. Daniel International*, 56 N.C. App. 445, 448, 289 S.E.2d 118, 119-20, *disc. review denied*, 305 N.C. 759, 292 S.E.2d 574 (1982) (Unfair or Deceptive Trade Practices Act does not create action against employer for harassment and dismissal of employee following work-related injury to prevent employee from claiming workers’ compensation benefits). The policy behind this statutory construction is that

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“[e]mployment practices fall within the purview of other statutes adopted for that express purpose.” *Buie*, 56 N.C. App. at 448, 289 S.E.2d at 120. However, in this case, the fraudulent actions allegedly committed involved conduct occurring after plaintiffs were no longer employed by the employer, and related to the settlement of the claims, not the accidents giving rise to the claims. Thus, this conduct does not fall within the scope of the employer-employee relationship governed by the Workers’ Compensation Act. *See N.C. Gen. Stat. § 97-2 (2) (1991)* (defining “employee”); *see also N.C. Gen. Stat. § 97-2 (6) (1991)* (defining compensable “injury” as one “by accident arising out of and in the course of the employment”). As discussed above, there is no other effective available remedy to penalize employers’ fraudulent conduct in regard to workers’ compensation claims under the Workers’ Compensation Act; we thus hold that this case is not controlled by *Buie*, 56 N.C. App. at 448, 289 S.E.2d at 120, and a cause of action against the employer exists under N.C. Gen. Stat. § 75-1.1.

We note, however, that this Court cannot ascertain from the complaint alone which actions were committed by the employer as plaintiffs’ complaint consistently refers to actions of the “defendants” without clarification as to whether “defendants” include the employer. However, because this case was dismissed on a motion upon the pleadings, we hold that the allegations against First Union were sufficient to survive the 12(b)(6) motion, and thus the trial court improperly dismissed the claims against the employer.

d. Civil conspiracy

[7] A claim for damages resulting from a conspiracy to defraud exists where there is an agreement between two or more persons to defraud a party, and as a result of acts done in furtherance of, and pursuant to the agreement, that party is damaged. *Fox v. Wilson*, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987) (citations omitted). “In such a case, all of the conspirators are liable, jointly and severally, for the act of any one of them done in furtherance of the agreement.” *Id.* A “conspiracy is an offense independent of the unlawful act which is its purpose.” *State v. Saunders*, 126 N.C. 524, 526, 485 S.E.2d 853, 854-55 (1997) (*quoting State v. Essick*, 67 N.C. App. 697, 700, 314 S.E.2d 268, 271 (1984) (“conspiracy is the crime and not its execution”)). Therefore, parties may be liable for conspiring to commit a statutory violation which they could not, because of their status, otherwise violate if acting alone. *See Saunders*, 126 N.C. at 526-27, 485 S.E.2d at 855 (defendant may be convicted of conspiracy to commit statutory

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crime of larceny by an employee even though defendant, himself, is not an employee).

In this case, the plaintiffs have alleged that the actions and conduct of defendants through their respective agents and employees . . . included overt acts committed by defendants Edwards, Deffenbaugh and other agents and employees of defendants, pursuant to a common agreement between them in furtherance of common objectives . . . to fraudulently and wrongfully deprive plaintiffs of workers' compensation benefits, medical treatment . . . and to intentionally defraud the [Commission] . . . constitutes a civil conspiracy among defendants.

We hold that plaintiffs have alleged a *prima facie* case against *all defendants*, and thus dismissal of the conspiracy claim was improper.

III. Doctrine of primary jurisdiction

[8] Finally we determine the appropriate procedure to dispose of cases involving underlying workers' compensation claims not yet resolved by the Industrial Commission. In *N.C. Chiropractic Assoc. v. Aetna Casualty & Surety Co.*, 89 N.C. App. 1, 9, 365 S.E.2d 312, 316-17 (1988), a case similar to the one before us, this Court applied the doctrine of primary jurisdiction. Under this doctrine, when it appears that "[s]ome aspects of plaintiffs' claims are clearly within the Industrial Commission's jurisdiction," as are the plaintiffs' claims for loss of workers' compensation benefits, "and resolution of these aspects could possibly also determine the resolution of plaintiffs' claims under the common [and statutory] law," the trial court should consider staying the claims before it until the Commission resolves the related claims. *Id.* at 9, 365 S.E.2d at 316-17. Prior to the determination of their workers' compensation claims before the Commission, the plaintiffs in *N.C. Chiropractic Association* filed a complaint in state court alleging unfair or deceptive trade practices and malicious interference with contractual rights involving workers' compensation claims. *Id.* Because of the common factual issues between the plaintiffs' claims and the underlying workers' compensation claims, the trial court refrained from exercising its jurisdiction to resolve the civil claims until after the Commission had resolved the workers' compensation claims. *Id.* (citations omitted).

Similarly, in the case before us, common factual issues exist between the civil claims and the claims for workers' compensation

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pending before the Commission which are more appropriately resolved by the Commission. First, with respect to the allegations that the Form 21 was fraudulently altered, the rules promulgated by the Commission govern, and it is the Commission's duty to determine whether such rules and procedures were violated. N.C. Gen. Stat. § 97-86 (Cum. Supp. 1997). For this reason, the Commission is also the appropriate tribunal to make the factual determinations as to whether the video accurately portrayed plaintiffs' work environment. *Id.* Until the Commission determines whether these actions by the defendants comply with its rules and procedures, it would be difficult for the trial court to determine whether such conduct is "extreme or outrageous," or determine if the claims were handled with bad faith or fraudulent intent. Thus, we stay these claims pending the issuance of the opinion and award for both plaintiffs.

In summary, we affirm the trial court's dismissal of the plaintiffs' claim for relief under N.C. Gen. Stat. § 58-63-15(11), and reverse the order granting the 12(b)(6) dismissal on all plaintiffs' other claims against defendant insurers and defendant employer and remand this case to the trial court with instructions to stay these claims until the Industrial Commission has ruled on the plaintiffs' underlying workers' compensation claims.

Affirmed in part, reversed in part, and remanded.

Chief Judge ARNOLD and MARTIN, John C., concur.

ELIZABETH ELSIE UPCHURCH, PLAINTIFF v. JAMES ELMON UPCHURCH AND
JAMES E. UPCHURCH, JR., DEFENDANTS

No. COA97-214

(Filed 3 February 1998)

1. Trusts and Trustees § 170 (NCI4th)—equitable distribution—constructive trust—findings supported by evidence

The trial court did not err by determining on remand that the evidence clearly and convincingly established facts giving rise to a constructive trust in an equitable distribution action where all but one finding was supported by competent evidence. If a party in an equitable distribution action acquired an equitable interest

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in property during marriage and before the date of separation, the trial judge may impose a constructive trust on the property to the extent of the equitable interest.

2. Divorce and Separation § 161 (NCI4th)—equitable distribution—note—unequal distribution rather than constructive trust

The trial court did not err in an equitable distribution action by distributing the value of a note unequally rather than imposing a constructive trust on the note or its proceeds where the trial judge's findings were supported by competent evidence and the court's decision to divide the property as it did was reasonable in light of the other findings regarding distribution factors.

Appeal by defendants James Elmon Upchurch and James E. Upchurch, Jr. from order entered 4 December 1996 by Judge Richard G. Chaney in Durham County District Court. Heard in the Court of Appeals 9 October 1997.

Harriss & Marion, P.L.L.C., by Joseph E. Marion, for plaintiff-appellee.

E.C. Harris, for defendant-appellant James Elmon Upchurch.

Browne, Flebotte, Wilson & Horn, P.L.L.C., by Roni L. Harvey, for defendant-appellant James E. Upchurch, Jr.

LEWIS, Judge.

Plaintiff and defendant James Elmon Upchurch ("Upchurch Sr.") were married in 1947 and separated on 4 February 1988. A judgment for absolute divorce was entered 13 November 1989 and plaintiff thereafter sued for equitable distribution of marital assets. Defendant James E. Upchurch, Jr. ("Upchurch Jr.") was made party to the suit because he possessed property that was allegedly "marital property." On 7 February 1995, the trial judge entered an equitable distribution order which imposed a constructive trust on certain assets held by Upchurch Jr. The trial judge included the impressed assets of Upchurch Jr. in the distribution of marital property. Defendants appealed to this Court. *Upchurch v. Upchurch*, 122 N.C. App. 172, 468 S.E.2d 61, *disc. review denied*, 343 N.C. 517, 472 S.E.2d 26 (1996) (*Upchurch I*).

In *Upchurch I*, we held that both legal and equitable interests are subject to distribution as marital property. *Id.* at 175, 468 S.E.2d at 63;

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see N.C. Gen. Stat. § 50-20 (1995). We noted that in the course of an equitable distribution proceeding, equitable interests may be recognized and wrested from the hands of the legal titleholder by the imposition of a constructive trust. *Id.* We also noted that the facts supporting a constructive trust must be established by clear and convincing evidence. *Id.* at 176, 468 S.E.2d at 64. In this case, because the first equitable distribution order did not indicate whether the constructive trusts imposed by the trial judge were established by clear and convincing evidence, we remanded the case for the judge to reconsider the evidence based on that standard of proof. *Id.*

Following remand, the trial judge entered an amended equitable distribution order on 4 December 1996. The order reaffirmed his previous conclusions that certain items were marital property, and the amended order expressly stated that these conclusions were supported by clear and convincing evidence. Defendants appeal from the amended order. We affirm.

First, we summarily dispose of three assignments of error raised by Upchurch Sr. Two of these assignments pertain to the alleged fraudulent concealment of assets by plaintiff. These issues were raised and resolved in defendants' prior appeal, *Upchurch I*, 112 N.C. App. at 177, 468 S.E.2d at 64, and they may not be resurrected now. In addition, Upchurch Sr. cites as error the trial judge's refusal to recuse himself from the case at defendants' request on 21 August 1996. The record shows no basis for defendants' motion and it was correctly denied.

[1] Defendants' next assignments of error pertain to the trial judge's findings that several assets held by Upchurch Jr. should be subjected to a constructive trust. In an action for equitable distribution, if a party acquired an equitable interest in property during marriage and before the date of separation (DOS), the trial judge may impose a constructive trust on the property to the extent of the equitable interest. See *Weatherford v. Keenan*, 128 N.C. App. 178, 493 S.E.2d 812 (1997). The person holding legal title to the property is thereby deemed to be constructive trustee of it for the benefit of the equitable titleholder. *Roper v. Edwards*, 323 N.C. 461, 464, 373 S.E.2d 423, 425 (1988). In a case such as this, where the trial judge simultaneously creates a constructive trust and determines that the trust property is "marital," we have described the constructive trustee as holding the property for the benefit of the marital estate. *Upchurch I*, 112 N.C. App. at 176, 468 S.E.2d at 64. When the trial judge distributes the equi-

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table interest, the constructive trustee must convey the legal interest to the party receiving the equitable interest in the distribution.

As we noted in *Upchurch I*,

It is not necessary to show fraud in order to establish a constructive trust. . . . Such a trust will arise by operation of law against one who “*in any way* against equity and good conscience” holds legal title to property which he should not.

112 N.C. App. at 177, 468 S.E.2d at 64 (quoting *Roper*, 323 N.C. at 465, 373 S.E.2d at 425). The facts giving rise to a constructive trust must be established by evidence that is clear and convincing. *Upchurch I*, 112 N.C. App. at 177, 468 S.E.2d at 64.

It is for the trier of fact to resolve issues of credibility and to determine the relative strength of competing evidence. *Lawing v. Lawing*, 81 N.C. App. 159, 177, 344 S.E.2d 100, 112 (1986). Therefore, if the fact finder determines that facts giving rise to a constructive trust have been established by clear and convincing evidence, we will not disturb those findings if they are supported by competent evidence. *Compare id.* at 177-78, 344 S.E.2d at 112-13 (upholding a finding that certain property acquired during marriage was separate property, where such a finding had to be proved by clear and convincing evidence, even though evidence on the issue was equivocal).

Defendants challenge the trial judge’s lengthy Findings of Fact 14, 15, 17, and 18, reproduced below. All of the findings contained therein, except for one detail which we discuss below, were supported by competent evidence in the record.

14. Defendant Upchurch, Jr. and Defendant Upchurch, Sr. purchased a lot and building located on Hillsborough Road in Durham, North Carolina in 1984. Plaintiff gave Defendant Upchurch, Sr. “thousands” of dollars which she had earned to put into the acquisition of the property. This property was sold by the Defendants in 1986 and Defendant Upchurch, Sr. received \$54,194.50 as a result of that sale, which represented one-half of the net sales proceeds.

Defendant Upchurch, Sr. invested the \$54,194.50 in a venture with Defendant Upchurch, Jr. to purchase property from Mickey Ellis for a purchase price of \$133,500.00; this property was sold back to Ellis on October 27, 1986 for a price of \$140,000.00. Of

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this amount, \$118,831.67 was deposited into an account with Wheat, First Securities ("WFS") in the name of Upchurch, Sr. and Upchurch, Jr. The balance of \$21,168.33 was deposited into a WFS account in the names of Upchurch, Sr. and Jack Upchurch. [Jack Upchurch is another son of Upchurch Sr. and is not a party to this suit.]

Defendant Upchurch, Sr.'s participation in the purchase price of \$133,500.00 (for the Ellis property) was at least \$54,194.50, or 41% of the purchase price. Therefore, Defendant Upchurch, Sr.'s proportionate share of the sales proceeds (when the Ellis property was sold) was 41% of \$140,000.00 or \$57,400.00. The Court finds that this \$57,400.00 was deposited into the WFS account held by Upchurch, Sr. and Upchurch, Jr. An additional \$10,333.00 was deposited into this account by two checks from Upchurch, Sr. Upchurch, Sr. therefore invested a total of \$67,733.00 into this account. The bonds were issued in the name of Upchurch, Sr. and Upchurch, Jr., and subsequently title was transferred by Upchurch, Sr. to Upchurch, Jr. solely. The bonds issued in Upchurch, Jr.'s name alone bear the date of October 1986, approximately four months prior to DOS.

The Court finds that the circumstances under which Upchurch, Jr. acquired title to \$67,733.00 worth of the bonds make it inequitable for him to retain title to that amount of the bonds. The Court finds that such amount of bonds is held by Upchurch, Jr. for the benefit of the marital estate and is marital property. All findings set forth in this finding of fact no. 14 were established by clear and convincing evidence.

The WFS account in the names of Upchurch, Sr. and Jack Upchurch was augmented by an additional sum of approximately \$15,000.00, deposited by three CCB checks showing Jack Upchurch as remitter. The Court finds there is insufficient evidence to show that Upchurch, Sr. has made any investment into this account, and therefore none of this account is marital property subject to distribution.

15. Paul McGhee and Brenda Vaughan executed a promissory note dated October 31, 1983 to Defendant Upchurch, Sr. and Defendant Upchurch, Jr. in the original principal amount of \$9,000.00. Defendant Upchurch, Sr.'s sworn Answers to Interrogatories 6, 16, and 17 of the 1987 Interrogatories (see Plaintiff's Exhibit 13) show that Defendant Upchurch, Sr.

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received \$225.00 per month on this note, which is the full amount of the payment called for under the note. Defendant Upchurch, Jr. did not report any interest from this loan on his 1985 or 1986 tax return. The value of this note as of the DOS was \$2,197.00. This value was computed by taking the pay-off on the note as of March 21, 1988, which was \$2,045.80 (as indicated in Plaintiff's Exhibit 44—letter from James Upchurch, Jr. to McGhee) and "backing-out" interest at 18% for 45 days. The note was apparently paid off prior to DOT [date of trial].

[The] Court finds that the circumstances under which Upchurch, Jr. acquired and held an interest in such note make it inequitable for him to retain title to, or claim any interest in such note. The Court finds that Upchurch, Jr.'s interest in such note is held by him for the benefit of the marital estate, and the entire note is marital property.

All findings set forth in this finding of fact no. 15 were established by clear and convincing evidence.

....

17. John Houk executed a promissory note dated March 23, 1983 to Defendant Upchurch, Sr. and Defendant Upchurch, Jr. in the original principal amount of \$30,000.00. Based on Defendant Upchurch, Sr.'s responses to the 1987 Interrogatories numbers 6, 16, and 17, stating that he received \$180.00 per month of the total monthly payment of \$300.00 on this note, the Court finds that Defendant Upchurch, Sr. owns 60% of the note. Defendant Upchurch, Jr. did not report any interest from this loan on his 1985 or 1986 tax return. The DOS value of Defendant Upchurch, Sr.'s interest in this note was \$13,209.32. This was computed by taking 60% of the reported total pay-off on the loan as of DOS of \$22,015.53, as shown by the answer to Interrogatory 3A, provided by James E. Upchurch, Jr. in response to Interrogatories to him. (Plaintiff's Exhibit 41). There is no evidence as to the value of this note as of DOT, although Defendant Upchurch, Sr., presumably continues to collect 60% of the \$300.00 monthly payments.

The Court finds that the circumstances under which Defendant Upchurch, Jr. acquired and held an interest in the note make it inequitable for him to retain title to or claim any interest in said 60% of the note. The Court finds that 60% of the note is held by Defendant Upchurch, Jr. for the benefit of the marital

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estate and is marital property, and the remaining 40% of the note is the property of Defendant Upchurch, Jr.

All findings set forth in this finding of fact no. 17 were established by clear and convincing evidence.

18. Phillip Arnold executed a promissory note dated May 23, 1983 to "James E. Upchurch or James E. Upchurch, Jr." in the original principal amount of \$20,908.84. The Court considered the testimony of Phillip Arnold, the evidence that all loan payments were made to Defendant Upchurch, Sr. up to the time of separation, the absence of any documentation from Upchurch, Jr. that he was the source of funds for the note, and determines that Defendant Upchurch, Sr. received all the benefit of this note at least up to DOS. The Court finds that Arnold had no dealings with anybody except Upchurch, Sr., at least up through DOS, and that Upchurch, Sr. offered to hire Arnold a lawyer so Arnold would not have to testify. The DOS value of the note was \$16,995.00, as determined by Defendant Upchurch, Sr.'s answer to Interrogatory 9 of the Interrogatories filed herein (Plaintiff's Exhibit 12). This note was paid off by payment of \$15,456.64 on August 3, 1989. Defendant Upchurch, Jr. did not report any interest from this loan on his 1985 or 1986 tax return.

[The] Court finds that the circumstances under which Upchurch, Jr. acquired and held an interest in this note make it inequitable for him to claim an interest in or retain title to such note. The Court finds that Upchurch, Jr.'s interest in this note is (or was) held by him for the benefit of the marital estate, and the entire note is marital property.

All findings set forth in this finding of fact no. 18 were established by clear and convincing evidence.

We note that Findings of Fact 14, 15, 17, and 18 also contain the conclusion of law that the Upchurch Jr. property at issue is marital property.

Defendants claim that these findings of fact were not supported by the requisite clear and convincing evidence. As to one particular, they are correct. In Finding of Fact 14, the trial judge mistakenly found that the municipal bonds issued in Upchurch Jr.'s name in October 1986 were so issued "approximately four months prior to DOS." This issuance actually occurred approximately one year and four months before the DOS in February 1988.

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Aside from this miscalculation, however, Findings of Fact 14, 15, 17 and 18 are otherwise supported by competent evidence and we leave them as they are. The trial judge was able to observe first-hand the testimony of plaintiff, Upchurch Sr., Upchurch Jr., and others. As finder of fact, the trial judge was responsible for determining the weight and credibility of the evidence. Our opinion in *Upchurch I* instructed the trial judge to reconsider the evidence and determine whether it clearly and convincingly established facts giving rise to a constructive trust. The amended order indicates that is precisely what the trial judge did. Moreover, on the facts found by the trial judge, the imposition of a constructive trust on the contested property in Findings of Fact 14, 15, 17, and 18 was legitimate.

[2] Defendants' remaining assignments of error involve the trial judge's Finding of Fact 16: That Upchurch Sr. was the owner of a promissory note executed by Marlene Harmon to "James E. Upchurch or Jack A. Upchurch," and that Upchurch Sr. alone had received the entire value of the note, which was \$39,495.00 at DOS. The trial judge made this finding despite the testimony of Upchurch Jr. that both he and Jack Upchurch received at least some of the proceeds of the Harmon note. The trial judge noted that because Jack Upchurch was not a party to this suit, he had no jurisdiction to distribute the note or its proceeds. Therefore, contrary to what is asserted in Upchurch Jr.'s brief, the trial judge refrained from imposing a constructive trust on the Harmon note or its proceeds.

Instead, the trial judge used the value of the note as a distributional factor under G.S. § 50-20(c)(12). The trial judge found that the benefit received by Upchurch Sr. from this note was a "significant and compelling distributional factor," and concluded that an equal distribution of the property would not be equitable. The trial judge therefore divided the marital property such that plaintiff's award exceeded Upchurch Sr.'s award by \$39,495.00, the value of the Harmon note on the DOS. Upchurch Sr. disputes this unequal distribution of property, but we believe that it was justified.

A ruling on whether an unequal division of marital property is appropriate will be upset only if it is manifestly unsupported by reason. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). In this case, we see no reason to alter the amended order for equitable distribution. The trial judge's findings regarding the Harmon note were supported by competent evidence, and the trial court's decision to divide the property as it did was reasonable in light of the other

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findings regarding factors of distribution. The amended order for equitable distribution is affirmed.

Affirmed.

Judges MARTIN, John C., and McGEE concur.

STATE OF NORTH CAROLINA v. JAMES THOMAS JORDAN, JR.

No. COA97-164

(Filed 3 February 1998)

1. Evidence and Witnesses § 1255 (NCI4th)— right to silence—custody—invocation of right to counsel—waiver—initiation of conversation—incriminating statements

The trial court properly concluded that defendant's constitutional right to silence was not violated by police officers while he was in custody where the evidence showed that defendant invoked his right to counsel but then initiated further conversation with the police officers and made a knowing and intelligent waiver of his previously asserted right to counsel.

2. Constitutional Law § 189 (NCI4th)— robbery and larceny—separate takings—not double jeopardy

The trial court did not err in finding that defendant's constitutional rights against double jeopardy were not violated by his being sentenced for both larceny and armed robbery in that there were two separate takings where there was a lapse of time between the defendant's taking of credit cards and jewelry in the victim's house and his leaving the house and stealing the victim's car.

3. Evidence and Witnesses § 1617 (NCI4th)— 911 call—reasoned decision—no abuse of discretion

The trial court did not abuse its discretion by admitting into evidence a tape recording of a 911 call from a robbery victim's children where the record showed that the court made a reasoned choice and weighed the potential prejudice against its probative value in rebutting inferences of improper police conduct

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that was raised by questions asked by defendant's counsel. N.C.G.S. § 8C-1, Rule 403.

Appeal by defendant from judgment and commitment entered 19 July 1996 by judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 October 1997.

Attorney General Michael F. Easley, by Associate Attorney General H. Dean Bowman, for the State.

Appellate Defendant Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Charlesena Elliott Walker, for defendant-appellant.

WYNN, Judge.

If a suspect requests counsel while in police custody, in order to protect the Fifth Amendment privilege against self-incrimination, the police must terminate interrogation unless the suspect initiates further communication. Because the defendant in this case initiated further communication after asserting his right to counsel, we affirm the trial court's denial of his motion to suppress his incriminating statements. Secondly, a defendant may be convicted of both armed robbery and larceny if the evidence shows that the defendant committed two separate takings. Because the evidence shows that the defendant in this case stole from the victim in her house and later stole her car, there were two takings to support his convictions for both crimes. Finally, we find no error in the trial court's admission into evidence of a tape recording of a 911 call from the victim's children.

Theresa Pollack was murdered by a gun shot to the head on 8 February 1995. In connection with this murder, James Thomas Jordan, Jr., was charged with first-degree murder, armed robbery, felonious breaking and entering, and felonious larceny. A jury convicted him of all charges and he was sentenced to consecutive terms of life imprisonment without parole. Jordan appeals.

I.

[1] Prior to his trial, Jordan moved the trial court to suppress inculpatory statements that he made while in police custody, contending that the statements were obtained in violation of his constitutional right to silence because they were elicited when officers continued to interrogate him, while he was in police custody, after he requested counsel. The trial court concluded that Jordan had invoked his right

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to counsel but that he also initiated further conversation with the police and made a knowing and intelligent waiver of his previously asserted right to counsel. On this reasoning the trial court denied Jordan's motion to suppress. We affirm that denial.

The trial court made findings based on evidence elicited during the *voir dire* hearing that after arresting Jordan, Charlotte police informed him of his rights and proceeded to question him. Jordan testified at the *voir dire* hearing that he understood his rights when they were explained to him. According to his testimony, his purpose in cooperating was to learn how much evidence the officers had against him.

Following several hours of interrogation, Jordan indicated that he "might" need an attorney. The officer questioning him immediately stopped, left the interview room, and informed his superior, Sergeant Rick Sanders, of what Jordan had said. Sergeant Sanders went into the interview room and asked Jordan if he needed a lawyer. Jordan responded "yes, I've told them the truth." Sergeant Sanders replied "no you did not that's bull shit, you're lying, and you're going to jail for murder." Sergeant Sanders then ordered his fellow officers to book Jordan.

The officers returned Jordan to the interview room and left him there alone for twenty minutes while an officer located the proper forms. When the officer brought the forms to Jordan, he requested to use the rest room. Officer Mike Sanders stated that sometime during the booking process and when he was taken to the rest room, Jordan stated "I told you I had something else to say if I was going to be charged." Jordan was returned to the interview room and left there by himself while the officer that he spoke to reported the statement. The officers conferred amongst themselves and concluded that the defendant was attempting to initiate further conversation. The police then re-approached Jordan, verified that he wanted to speak without a lawyer, and subsequently elicited the incriminating statements.

Other findings made by the trial court indicated that the police repeatedly informed Jordan of his rights during the interrogation process. In particular, when the police re-approached him after he had made the statement in the bathroom, the trial court found that a detective informed him that he had invoked his right to counsel, the police were compelled to stop interviewing him, and that they would not seek any further information from him unless he reinitiated con-

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tact. Furthermore, the officer again explained the defendant's right to not talk without a lawyer present. Jordan then said that he wished to talk with the officers. He then said that he wanted to waive his right to have an attorney present, and went on to make the incriminating statements.

Once a suspect in police custody requests counsel, the police may not further interrogate the suspect until counsel has been provided, unless the suspect initiates further communication. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 386 (1981). In *Rhode Island v. Innis*, 446 U.S. 291, 301-02, 64 L. Ed. 2d 297, 308 (1980), the United States Supreme Court established the test for what constitutes interrogation:

[Interrogation is a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

(footnotes omitted) (emphasis added).

We agree with the trial court that Jordan invoked his right to counsel. Thus the initial issue is whether the police continued to interrogate Jordan after he asserted that right. Jordan contends that the remarks Sergeant Sanders made to him after he invoked his right to counsel constituted the functional equivalent of interrogation, both when considered alone and in combination with the booking procedure. We disagree.

The officer's statement in this case was not interrogation or its functional equivalent. The entire exchange was very brief. Nor was this statement "reasonably likely to evoke an incriminating response." There is nothing to indicate that an officer should have known that this statement would lead the suspect to make an incriminating response.

We reach the same conclusion when viewing the statement in context with the booking procedure used. The officer left the room and closed the door after making the statement. The policemen left Jordan alone while they got the forms for booking him. In contrast to Jordan's contention, the lack of police presence during the booking

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process is not reasonably likely to evoke an incriminating response. Accordingly, we hold that the police did not continue to interrogate Jordan after he asked for a lawyer.

We next turn to whether the defendant reinitiated communication. The record reflects abundant support for the trial court's conclusion that he did. After asserting his right to counsel, Jordan spontaneously made in the bathroom the statement: "I told you I had something else to say if I was going to be charged." After he made the statement, the police proceeded cautiously, again informing him of his rights and ensuring that he wanted to talk to them before they began questioning him again. Under these circumstances, we find the evidence supports the trial court's finding that Jordan reinitiated communication. Accordingly, we hold that the trial court did not err by admitting into evidence the statements made by Jordan.

II.

[2] Jordan next argues that the trial court violated the constitutional prohibition against double jeopardy by sentencing him for both larceny and armed robbery. He argues that since there was no temporal break between his taking of jewelry and credit cards from the victim, and the theft of the victim's vehicle, he can not be charged for two different crimes for the same offense. We disagree.

In *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988), our Supreme Court held that larceny is a lesser included offense of armed robbery. *Id.* at 514, 369 S.E.2d at 817. In *State v. Adams*, the Court pointed out that "'[a] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place.'" 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992), quoting *State v. Froneberger*, 81 N.C. App. 398, 401, 344 S.E.2d 344, 347 (1986). For example, in *State v. Jaynes*, 342 N.C. 249, 464 S.E.2d 448 (1995), cert. denied, — U.S. —, 135 L. Ed. 2d 1080 (1996), the defendant placed property belonging to the victim in the victim's vehicles and drove them away. The Court held that "[t]he takings of the vehicles and the other items occurred simultaneously and were linked together in a continuous act or transaction" and that "there was no basis on which to distinguish the taking of the smaller items of personal property from the takings of the vehicles." *Id.* at 276, 464 S.E.2d at 464-65. Finding only one taking, the Court concluded that sentencing the defendant for both robbery and larceny violated double jeopardy. *Id.*

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Likewise, in *State v. Buckner*, 342 N.C. 198, 464 S.E.2d 414 (1995), *cert. denied*, — U.S. —, 136 L. Ed. 2d 47 (1996), the defendant shot the victim right after the victim got out of his car. *Id.* at 209, 464 S.E.2d at 420. The defendant then grabbed the victim's briefcase and drove away in the victim's car. *Id.* at 210, 464 S.E.2d at 420. On appeal from his convictions for armed robbery and larceny, the Court held that the defendant's constitutional right against double jeopardy was violated because both offenses were part of the same continuous transaction. *Id.* at 233, 464 S.E.2d at 434.

However, a defendant may be convicted of both armed robbery and larceny if the crimes involved two separate takings. *White*, 322 N.C. at 517, 369 S.E.2d at 818. As an example, in *State v. Robinson*, 342 N.C. 74, 463 S.E.2d 218 (1995), *cert. denied*, — U.S. —, 134 L. Ed. 2d 793 (1996), the defendant shot the victim and then took the victim's wallet. *Id.* at 79-80, 463 S.E.2d at 221-22. The defendant then left the murder scene, went to a park, and walked around the neighborhood. *Id.* at 83-84, 463 S.E.2d at 224. The defendant later returned and took the victim's car. *Id.* The Court held that the takings of the wallet and the car were separate and the defendant was properly sentenced for both crimes. *Id.*

Similarly, in *State v. Barton*, 335 N.C. 741, 441 S.E.2d 306 (1994), the defendant shot and killed the victim. He then took his wallet, fled the murder scene in his car, and later took a firearm from the car's glove compartment. *Id.* at 744-45, 441 S.E.2d at 308. The Court upheld the defendant's separate convictions for armed robbery and larceny, stating the "armed robbery of the victim—resulting in the taking of his wallet and automobile—and the subsequent taking of the victim's firearm from his automobile constituted separate takings for double jeopardy purposes." *Id.* at 746, 441 S.E.2d at 309.

In the present case, Jordan was apparently initially motivated by his desire to steal the victim's car. However, once he entered her home he stayed for fifteen to twenty minutes. He walked through the victim's house, deciding what property he wanted to take. After taking credit cards and jewelry, he then went to her car and drove off. This distinguishes the present case from those where there was a continuous transaction. Both *Jaynes* and *Buckner* involved nearly simultaneous takings of property from the victim along with the theft of the victim's vehicle. Essentially, those were cases where there was one crime with multiple items of property stolen at the same time. Here, Jordan stole from the victim in her house. He then left her

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house and stole her car. Because of the lapse of time between the two takings, we conclude that separate takings occurred in this case. Accordingly, we hold that the trial court did not err in sentencing the defendant for both armed robbery and larceny.

III.

[3] Jordan finally argues that the trial court committed reversible error by admitting into evidence a tape recording of a 911 call from the victim's children because it was irrelevant and its prejudicial effect substantially outweighed its probative value. We disagree.

Under N.C. Gen. Stat. § 8C-1, Rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The decision to exclude evidence under Rule 403 is left to the discretion of the trial court, and will only be reversed on appeal upon a showing that the decision was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision. *State v. Womble*, 343 N.C. 667, 690, 473 S.E.2d 291, 304 (1996), cert. denied, — U.S. —, 131 L. Ed. 2d. 719 (1997).

Jordan argues that the tape was not relevant and that the trial court erred by admitting it because its potential prejudice substantially outweighed its probative value. Based on this alleged error, he argues that he did not receive a fair trial and asks for a new trial. Jordan's argument, however, fails to consider the discretion given to a trial court in ruling on a Rule 403 decision.

Rule 403 says that "evidence *may* be excluded," (emphasis added) not that the evidence *must* be excluded. As *Womble* points out, once the prerequisite of prejudice outweighing probative value is present, the rule places the decision on whether to exclude within the discretion of the trial court. Even assuming *arguendo* that we agreed with his argument that the potential prejudice of the tape outweighed its probative value, that showing is not sufficient to allow this Court to conclude that the trial court erred. As *Williams* illustrates, where the trial court is given discretion to make a decision and exercises that discretion, we may only reverse that decision if the appellant shows that the decision was not the result of a reasoned choice.

Jordan's brief does not, beyond merely pointing out that the prejudice outweighed the probative value, discuss how the trial court abused its discretion. Merely showing that the prejudice substantially outweighed the probative value of evidence does not suffice to show

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abuse. A contrary result would effectively remove the discretion which the plain language of the statute entrusts to the trial court. Accordingly, following *Womble*, because no showing of an abuse of discretion was made, we affirm the trial court's decision.

Furthermore, we note that the record reflects that the trial court made a reasoned decision in admitting the tape. Initially the trial court ruled that the tape would be excluded. During the presentation of the State's case, the prosecutor moved for a reconsideration of the admissibility of the 911 tape. Following a discussion between the attorneys and the judge, the judge made the following comments:

Well, but my question is this. There was a significant line of questions by [defense counsel] in cross-examination.

For example, I wrote down in quotation marks in my notes that he asked Investigator Holl something about the fact that it is critically important not to destroy any evidence, and to preserve the integrity of the crime scene.

Now a number of questions were asked in that vein as to seeking to get the officer to agree as to the importance of maintaining the security and the integrity of the crime scene.

....

Well, clearly the question for me is one under Rule 403, and that involves a weighing of the probative value of the evidence that's being offered against the possible prejudicial effect.

The possible inflammation of the passions of the jury and as well as the other considerations mentioned in that rule.

....

In this particular case, I need to weigh the possible emotional effect of the playing of the tape against its probative value, and in the context in which it's being offered.

There have been some questions raised as to whether or not the integrity of the crime scene was preserved in this particular case.

Those questions were raised during the course of the cross-examination of Investigator Holl during the course of which same cross-examination, there were a number of references made to the fact that Investigator Holl had lied to Dennis Ingram in order to obtain information from Dennis Ingram.

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And as a result of that, there certainly could be an inference by the jury of dishonesty on the part of police officers involved in the investigation.

And particularly when considered in conjunction with the word integrity of the crime scene, which word was specifically mentioned during the course of the examination, and it's natural that jurors might infer that the word integrity was associated, not only with the security at the time of the crime scene, but also with the honesty of the officers involved in the investigation of the crime scene.

Based upon that weighing, I am going to rule, in the exercise of discretion, that the 911 now has become admissible, and may be played to the jury.

It is apparent that the trial court's decision to admit the tape was a reasoned choice; the court weighed the potential prejudice against its probative value in rebutting inferences of improper police conduct that might of been raised by the questions asked by Jordan's counsel. Accordingly, we hold that the trial court did not abuse its discretion by admitting it.

For the reasons given above, we find that the defendant received a fair trial, free from prejudicial error.

No error.

Judges EAGLES and MARTIN, Mark D., concur.

COUNTY OF CARTERET, PLAINTIFF v. CURTIS L. LONG; RICHARD RICHARDSON AND WIFE, ARLETHA RICHARDSON; THE STATE OF NORTH CAROLINA (LIENOR), DEFENDANTS

No. COA97-39

(Filed 3 February 1998)

Taxation § 208 (NCI4th)—ad valorem tax lien—priority over State tax lien

County ad valorem tax liens under the Machinery Act have priority over State tax liens under the Revenue Act even when the State tax lien is docketed in advance of the county lien. Although

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the statutes are ambiguous as to which lien should have priority, policy considerations support the conclusion that the legislature did not intend to allow the State to cut off local tax liens, which are the county's major recourse for collecting tax revenue, upon the filing of a certificate of tax liability. N.C.G.S. §§ 105-241(d), 105-356(a).

Judge GREENE dissenting.

Appeal by defendant, the State of North Carolina, from Judgment of Foreclosure on Tax Lien dated 26 September 1996 by Judge Jerry F. Waddell in Carteret County District Court. Heard in the Court of Appeals 11 September 1997.

Attorney General Michael F. Easley, by Special Deputy Attorney General George W. Boylan, for the State.

Beven W. Wall, for plaintiff-appellee.

WYNN, Judge.

On 6 February 1996, based on an ad valorem tax lien for each year from 1986 to 1995, the County of Carteret ("County") foreclosed on real property located in Carteret County. As evidenced by a certificate of tax liability, docketed 7 December 1993, the State of North Carolina ("State") placed a judgment lien on the same real property, and contends that this lien is superior to the County lien for the years 1994 and 1995. Both the State and the County filed motions for summary judgment. In granting summary judgment in favor of the County, the trial court concluded:

[The] County's lien arising by operation of law for county ad valorem taxes on real property for the 1986 through 1995 tax years, including specifically those arising for the 1994 and 1995 tax years are superior to the judgment lien in favor of the State of North Carolina evidenced by Certificate of Tax liability docketed in the Office of the Clerk of Superior Court of Carteret County on [7 December 1993] in the amount of \$1,603.24 plus interest as set forth therein.

The State now appeals this issue to us.

I.

State taxes are provided for under the Revenue Act, N.C. Gen. Stat. §§ 105-1 to 105-270 (1997), while county taxes are provided for under the Machinery Act, N.C. Gen. Stat. §§ 105-271 to 105-396 (1997).

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Both of these acts set forth priority rules for tax liens. Section 105-241 of the Revenue Act provides in pertinent part:

(d) *Lien.*—This subsection applies *except when another Article of this Chapter contains contrary provisions with respect to a lien for a tax levied in that Article.* The lien of a tax attaches to all real and personal property of a taxpayer on the date a tax owed by the taxpayer becomes due. The lien continues until the tax and any interest, penalty, and costs associated with the tax are paid. A tax lien is not extinguished by the sale of the taxpayer's property. A tax lien, however, is not enforceable against a bona fide purchaser for value or the holder of a duly recorded lien unless:

(1) In the case of real property, a certificate of tax liability or a judgment was first docketed in the office of the clerk of superior court of the county in which the real property is located.

...

The priority of these claims and liens is determined by the date and time of recording, docketing, levy, or bona fide purchase.

N.C. Gen. Stat. § 105-241(d) (1997) (emphasis added). The pertinent part of Section 105-356 of the Machinery Act provides:

(a) *On Real Property.*—The lien of taxes imposed on real and personal property shall attach to real property [every January 1st]. The priority of that lien shall be determined in accordance with the following rules:

(1) *Subject to the provisions of the Revenue Act prescribing the priority of the lien for State taxes,* the lien of taxes imposed under the provisions of this Subchapter shall be superior to all other liens, assessments, charges, rights, and claims of any and every kind in and to the real property to which the lien for taxes attaches regardless of the claimant and regardless of whether acquired prior or subsequent to the attachment of the lien for taxes.

N.C. Gen. Stat. § 105-356(a) (1997) (emphasis added).

It is a well-established principle of statutory construction that when a statute is clear and unambiguous, "there is no room for judi-

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cial construction,’ and the statute must be given effect in accordance with its plain and definite meaning.” *Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (quoting *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980)). In this case, however, the general statutes are ambiguous as to which lien should have priority.

Under section 105-356 of the Machinery Act, the county lien is granted priority over “all other liens, assessments, charges, rights, and claims of any and every kind in and to the real property to which the lien for taxes attaches regardless of the claimant and regardless of whether acquired prior or subsequent to the attachment of the lien for taxes.” N.C. Gen. Stat. § 105-356 (1997). Under this rule, the county lien would have priority. However, the statute qualifies this first priority by making it “[s]ubject to the provisions of the Revenue Act prescribing the priority of the lien for State taxes.” *Id.*

Two parts of section 105-241 of the Revenue Act discuss the priority of State tax liens.

First, section 105-241(d) provides that a State tax lien is enforceable against the holder of a duly recorded lien once a certificate of tax liability is filed. N.C. Gen. Stat. § 105-241(d) (1997). Furthermore, “[t]he priority of these claims and liens is determined by the date and time of recording, docketing, levy, or bona fide purchase.” *Id.* Therefore, because the section 105-356 lien is “subject to” this rule, once a certificate of tax liability has been filed, the State tax lien becomes enforceable against the county tax lien and furthermore the priority between the liens is determined chronologically.

However, section 105-356 is also “subject to” the second part of section 105-241’s priority rule— “[Section 105-241] applies except when another Article of this Chapter contains contrary provisions with respect to a lien for a tax levied in that Article.” *Id.* Section 105-356—which provides for first priority for a municipal tax lien—therefore contains a “contrary provision.” Thus, section 105-241 would not be applicable. In short, the statutory language leads to circular reasoning without resolution, and is, therefore, ambiguous.

II.

Having concluded that the general statutes are ambiguous on this issue, we now undertake the well-settled practice of examining the underlying policies of the statutes in order to resolve the ambiguity.

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Our court previously addressed this question in *County of Lenoir v. Moore*, 114 N.C. App. 110, 441 S.E.2d 589 (1994), *aff'd*, 340 N.C. 104, 455 S.E.2d 158 (1995). There, we considered a statute substantially the same as the present one and held that Machinery Act liens have priority over Revenue Act liens. *See id.* at 119, 441 S.E.2d at 594. With one justice abstaining, our Supreme Court split evenly when it reviewed that case, and as a result *Moore* was affirmed without precedential value. *See County of Lenoir v. Moore*, 340 N.C. 104, 455 S.E.2d 158 (1995). Although we recognize that *Moore* is not binding authority upon our court, we find its discussion of the policy considerations behind the Machinery and Revenue acts instructive upon the question that we now consider.

In *Moore*, citing *Saluda v. Polk County*, 207 N.C. 180, 185, 176 S.E. 298, 301 (1934), we noted that "real property ad valorem taxes are inherently public in character: they are statutorily authorized taxes that serve the need of the community as a whole." 114 N.C. App. at 116, 441 S.E.2d at 592. We also noted that the General Assembly expressly recognized the "first lien" priority of local ad valorem taxes in N.C. Gen. Stat. § 105-321(b). *Id.* at 117-18, 441 S.E.2d at 593. We found further support for our holding in the nature of ad valorem taxes, which arise by operation of law. *See id.* at 118-19, 441 S.E.2d at 593-94. *Moore* also noted the long established understanding that local taxes had priority under Chapter 105. *See id.* at 119-20, 441 S.E.2d at 594.

In addition to the factors considered in *Moore*, the differences in the priority systems provided by the legislature provides further support for the position taken in *Moore*. Under the Machinery Act, municipal liens are given priority over other liens, "regardless of whether acquired prior or subsequent to the attachment of the lien for taxes." N.C. Gen. Stat. § 105-356(a)(1) (1997). In contrast, for liens under the Revenue Act, priority "is determined by the date and time of recording, docketing, levy, or bona fide purchase." N.C. Gen. Stat. § 105-241(d) (1997). Additionally, the Revenue act places limitations on the ability of the State to proceed against a taxpayer's real property. *See* N.C. Gen. Stat. § 105-242 (limiting the sale of real property under State certificate of tax liability or judgment with administrative process) and § 105-242(e) (protecting certain property of taxpayer, including taxpayer's principal residence, from judgment lien execution, absent special procedures). The Machinery Act does not so limit the county's foreclosure authority.

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Furthermore, counties are in a better position to purchase and remarket foreclosed land than the state. A local taxing unit can evaluate a property, value it against local market conditions, and bid more efficiently than the State can oversee land sales in one hundred counties. Placing priority with the State lien places it with the unit of government in the poorest position to evaluate and recover tax revenue from a piece of property. Finally, as the County of Carteret points out, the State has access to numerous revenue sources, while counties primarily rely on ad valorem taxes.

In light of these considerations, we conclude that the general assembly did not intend to allow the State to cut off local tax liens, which is a county's major recourse for collecting tax revenue, upon the filing of a certificate of tax liability. Accordingly, the trial court correctly determined that the county's lien had priority over the state lien.

Affirmed.

Judge MARTIN, Mark D., concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

The majority correctly notes the well-established principle of statutory construction that when a statute is clear and unambiguous, "there is no room for judicial construction," and the statute must be given effect in accordance with its plain and definite meaning." *Avco Financial Services v. Isbell*, 67 N.C. App. 341, 343, 312 S.E.2d 707, 708 (1984) (quoting *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980)). Unlike the majority, however, I believe that the statutory provisions relevant to this case are unambiguous. The Machinery Act's priority rules are plainly "[s]ubject to the provisions of the Revenue Act prescribing the priority of the lien for State taxes . . ." N.C.G.S. § 105-356(a)(1) (1997). While the Revenue Act states that it does not apply "when another Article of this Chapter contains contrary provisions with respect to a lien for a tax levied in that Article . . .," N.C.G.S. § 105-241(d) (1997), the Machinery Act does *not* contain contrary provisions because of the "subject to" language contained therein. By plainly subjecting the otherwise contrary provisions of the Machinery Act to the provisions of the Revenue Act, the legislature leaves no room for the majority's judicial construction.

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The Revenue Act therefore provides the priority rules as between state and local taxes. Under the straightforward language of the Revenue Act, state tax liens are deemed superior to local ad valorem tax liens when they are docketed in the office of the county clerk of court prior to the date the ad valorem tax liens are perfected by operation of law.

The majority notes, and I acknowledge, that this Court has previously held that county ad valorem tax liens have priority over state tax liens, even when the state tax lien is docketed in advance of the county lien. *County of Lenoir v. Moore*, 114 N.C. App. 110, 441 S.E.2d 589 (1994), *aff'd by an equally divided Court*, 340 N.C. 104, 455 S.E.2d 158 (1995). The *Moore* opinion, however, was affirmed by our Supreme Court "without precedential value" and accordingly we must resolve the issue "without regard" to *Moore*. *Elliot v. N.C. Dept. of Human Resources*, 115 N.C. App. 613, 620, 446 S.E.2d 809, 813-14 (1994), *aff'd per curiam*, 341 N.C. 191, 459 S.E.2d 273 (1995). In any event, the language of the statute at issue in this case is different from the language contained in the statute controlling the resolution of the issue presented in *Moore*, in that the legislature has amended the Revenue Act and has deleted some of the language relied on by the *Moore* majority.

In this case, the State docketed a Certificate of Tax Liability in the Carteret County Clerk of Superior Court's office on 7 December 1993. The County ad valorem tax liens, which arose by operation of law on 1 January 1994 and 1 January 1995, were therefore inferior to the properly docketed state lien. Accordingly, I would reverse both the trial court's grant of summary judgment for the County and the trial court's denial of summary judgment for the State, and remand for entry of summary judgment for the State.

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[128 N.C. App. 484 (1998)]

JEFFREY B. GRAM, PLAINTIFF-APPELLEE V. WILLIAM R. DAVIS, COOPER & DAVIS,
A NORTH CAROLINA PARTNERSHIP, AND A. JAY BLAKE, DEFENDANT-APPELLANTS

No. COA97-205

(Filed 3 February 1998)

1. Attorneys at Law § 46 (NCI4th)— attorney malpractice—failure to inform about restrictive covenant—proximate cause

The evidence in a legal malpractice action was sufficient for the jury to find that negligence by defendant attorneys in failing to inform plaintiff purchaser of a lakefront tract and an adjoining lot that a restrictive covenant prevented the lot from being used for access to the lakefront property was a proximate cause of damages resulting from plaintiffs' inability to sell lots in the lakefront tract until the covenant was modified to allow such access, rather than a grading company's lien on the lakefront tract, since the lien was not an insurmountable obstacle to sale of the lots because plaintiff could have paid the lien or could have obtained a bond to remove the lien's encumbrance on the property in order to sell the lots.

2. Attorneys at Law § 49 (NCI4th)— legal malpractice—damages—attorney fees in removing restriction

The plaintiff in a legal malpractice action was properly permitted to introduce on the issue of damages evidence of attorney fees he incurred to remove a restriction on land about which defendant attorneys failed to inform him. Even if it was error to admit this evidence, defendants were not prejudiced where the trial court explicitly instructed the jury that damages should not include attorney fees incurred in prosecuting this case.

3. Trial § 475 (NCI4th)— quotient verdict—no evidence of a prior agreement

Evidence that the jury verdict was one-half of the amount sought by plaintiff was insufficient to show that the jury had reached a quotient verdict so as to warrant a new trial where there was no evidence tending to show that the jurors had reached a prior agreement to be bound by the average of the amount each submitted as damages.

Appeal by defendants from judgment entered 15 August 1996 and order entered 29 August 1996 by Judge E. Lynn Johnson in

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Cumberland County Superior Court. Heard in the Court of Appeals 23 October 1997.

Broughton, Wilkins, Webb & Sugg, P.A., by William Woodward Webb, R. Palmer Sugg, and Benjamin E. Thompson, III, for plaintiff-appellee.

Anderson, Johnson, Lawrence, Butler & Bock, by Lee B. Johnson, for defendant-appellants.

McGEE, Judge.

This appeal arises from a malpractice action filed against defendant counsel and defendant law firm (collectively defendants) on 5 March 1993 by plaintiff for damages he alleged he incurred as a result of defendants' negligent failure to inform him that a restrictive covenant burdening real property he intended to purchase prohibited the use of the land to access another subdivision.

Plaintiff's evidence at trial tended to show that in January 1990 plaintiff made an offer to purchase approximately twenty-two acres of land on Hope Mills Lake in Hope Mills, North Carolina (Hope Mills tract), and a lot in the adjoining subdivision of Clifton Forge (Lot 7). As the Hope Mills tract was accessible by land only across Lot 7, plaintiff bought Lot 7 in order to build a road upon it to access the Hope Mills tract and to develop the tract into a subdivision called The Cove. After the legal services of defendants were retained by plaintiff to perform the closing on the property, defendants completed a title search and discovered that several restrictive covenants applied to Lot 7, one of which restricted the use of the property to residential use only. Plaintiff argued defendants negligently advised him that the restriction would not prevent him from building a road across Lot 7 to provide access to the Hope Mills tract, when in fact the restrictive covenant did prohibit the use of Lot 7 to access another subdivision.

Plaintiff's evidence was that between the time of closing of the property in the spring of 1990 and May 1991 plaintiff made improvements on both properties including installing water and sewer systems and constructing roads, including the road across Lot 7. In May 1991 plaintiff learned that Lot 7 could not be used to access The Cove. Plaintiff then attempted unsuccessfully to purchase another tract of adjacent property to obtain this access. Plaintiff testified that despite receiving numerous inquiries by potential buyers, he did not sell any lots in The Cove. On 20 May 1991 Autry Grading Company

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recorded a lien in the amount of approximately \$76,000.00 on plaintiff's property for services performed by the grading company. In their answer, defendants alleged several affirmative defenses and at trial they argued that the lien on the land effectively prevented sale by plaintiff of any lot in The Cove and any damage incurred by plaintiff did not occur until after the lien was canceled. They alleged defendants' negligence was not the proximate cause of plaintiff's injuries.

In June 1992 a modification of the restrictive covenant on Lot 7 was recorded allowing access to the Hope Mills tract via Lot 7. This modification was obtained by defendants through negotiation with surrounding landowners. The lien encumbering the property was removed in July 1992.

At trial, plaintiff did not dispute the existence of the lien, but argued instead that it did not create an insurmountable barrier to the sale of the lots. An expert witness in real estate law testified that plaintiff may have been able to have the property released from the lien by securing a bond to which the lien would then attach. Plaintiff was also free to pay the full amount of the lien to release the property. One reason plaintiff cited for not paying the grading invoices was that he had been overcharged for the grading company's services and was disputing the amount owed. However, plaintiff stated that he would have paid the final invoice in full if it was the only obstacle preventing him from selling the property.

Plaintiff's appraiser initially testified at trial that plaintiff incurred damages in the amount of \$327,000.00. This estimate was based on the approximate twenty months' delay in obtaining marketable title which prevented plaintiff from selling lots from 1 May 1991, the date of the discovery of the access problem, and the date in January 1993 when he obtained title insurance on the land. The trial court, however, limited the amount of damages to those sustained between 1 May 1991, the date the restrictive covenant was discovered, and 2 June 1992, the date the modification of the restrictive covenant was filed. The trial court then allowed the appraiser to recalculate the amount of estimated damages and to testify that the amount of damages sustained by plaintiff was \$266,948.00.

Plaintiff also testified on cross-examination about the amount of damages he incurred:

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Q. That sixty thousand—more than sixty thousand dollars . . . that you've spent, in addition to the three hundred and twenty-seven thousand that you claim you lost, was spent on what?

A. . . . the majority of it was spent—certainly the largest amount of it, was spent in the beginning with Tim Barber who was my lawyer for—from about November or December 1991 until 1993 sometime. And he was the one that was working with [defendants] trying to get the problem resolved.

...

Q. So, what you're saying is that you spent sixty thousand dollars in attorneys' fees in prosecuting your claim?

A. No, I said that I spent more than sixty thousand dollars, and the majority of it was in attorneys' fees, to solve—to date, to solve the problem. Obviously, I'm spending attorneys' fees now. I can't even recover those . . . all I want to do is be made whole, and I spent money in the beginning trying to do that.

...

Q. —having not purchased any lots or easements, what specifically did you spend more than sixty thousand dollars on?

A. I spent money on appraisers. And that is, as far as I'm concerned at this point, in direct connection with this . . . lawsuit.

Q. Prosecution of this claim?

A. Correct. . . . And I also spent money with my surveyors in the beginning. Just keeping people going out there that normally would not have had to go out there because there would be activity and the lots would have been selling. . . .

But the majority of it . . . is on attorneys' fees to fix the problem and also I'm spending money on attorneys' fees to get where we are today.

Defendants moved for a directed verdict at the close of plaintiff's case on the basis that the lien, rather than the restrictive covenant, prevented plaintiff from selling lots in The Cove; and thus, defendants' negligence was not the proximate cause of plaintiff's damages. The motion was denied. At the close of all the evidence, the trial court directed a verdict for plaintiff on the issue of defendants' negligence. Thus, the only issues submitted to the jury were whether defendants' negligence was a proximate cause of plaintiff's damages

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and the calculation of the amount of damages plaintiff was entitled to recover. On the latter issue, the trial court instructed the jury that:

Evidence has been received that plaintiff suffered certain expenses in connection with his efforts dealing with the access problem to his subdivision. Damages include such reasonable expenses as you find from the evidence aris[ing] naturally and proximately from the access problem to his subdivision and are reasonably definite and certain, excluding any costs or attorneys' fees in the prosecution of this action.

The jury determined that defendants' negligence was the proximate cause of plaintiff's damages and awarded plaintiff \$164,000.00. Defendants moved for a new trial, which was denied in an order entered 29 August 1996.

The issues presented are: (1) whether there was sufficient evidence to sustain a finding that the negligence of defendants was the proximate cause of plaintiff's injuries, (2) whether the attorneys' fees paid to third parties to remedy the effects of an attorney's malpractice are recoverable as damages in a legal malpractice action, and (3) whether the trial court erred in denying defendants' motion for a new trial on the grounds that the jury returned a quotient verdict determined by averaging each juror's award.

I. Proximate Cause

[1] Defendants contend that their negligence was not the proximate cause of plaintiff's injuries because plaintiff was prevented from selling lots while the lien existed against the property. Defendants argue that their directed verdict on this issue was erroneously denied. We disagree. The standard for reviewing a denial of a directed verdict motion requires that "all of the evidence which tends to support the [non-moving party's] claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which may be legitimately drawn therefrom." *Murphy v. Edwards and Warren*, 36 N.C. App. 653, 659, 245 S.E.2d 212, 216-17, *disc. review denied*, 295 N.C. 551, 248 S.E.2d 728 (1978).

Plaintiff testified at trial that he would have paid the full amount of the lien in order to sell the lots, even though he was contesting the amount of the lien on grounds that the grading company had not performed all of the services claimed. The possibility of obtaining a bond to remove the lien's encumbrance on the property also existed. Viewing these facts in the light most favorable to plaintiff, we hold

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that the lien was not an insurmountable obstacle to prevent plaintiff from selling the property; thus, it was not the proximate cause of plaintiff's damages. We reject defendants' first argument.

II. Attorneys' Fees as Damages

[2] Defendants next argue that the trial court erred by failing to exclude plaintiff's testimony regarding the attorneys' fees he incurred as a result of defendants' negligence. We disagree. Although the general rule in North Carolina is that attorneys' fees and other costs associated with litigation are not recoverable in a legal malpractice action absent statutory liability, *Martin v. Hartford Accident and Indemnity Co.*, 68 N.C. App. 534, 536, 316 S.E.2d 126, 127, *disc. review denied*, 311 N.C. 760, 321 S.E.2d 140 (1984), this rule does not apply to bar recovery for costs, including attorneys' fees, incurred by a plaintiff to remedy the injury caused by the malpractice. *See Greene v. Carpenter, Wilson, Cannon and Blair*, 119 N.C. App. 415, 418, 458 S.E.2d 507, 509 (1995) ("proper measure of damages in a legal malpractice action is the difference between the plaintiff's actual pecuniary position and what plaintiff's pecuniary position should have been if the attorney's malpractice had not occurred"). Thus, when the plaintiff "retains title to the property, the damages may be the amount required to free the land from [the] encumbrance." 7A C.J.S. *Attorney & Client* § 273 (1980).

The policy supporting this rule is that rather than attempting to recover the attorneys' fees he expended in litigating the malpractice action, the plaintiff is merely attempting to place himself in the same position as he would have been *but for* the negligence of the defendants. *See Sorenson v. Fio Rito*, 413 N.E.2d 47, 51-52 (Ill. App. Ct. 1980) (allowing recovery for attorneys' fees spent to mitigate damages incurred as result of attorney malpractice). In this case, the recovery of attorneys' fees spent attempting to remove the lien from the property is consistent with plaintiff's duty to mitigate damages and is necessary to place the plaintiff in the position he would have been but for the defendants' negligence.

Moreover, assuming *arguendo* that it was error to admit plaintiff's testimony in regard to attorneys' fees, defendants have failed to show prejudice because the trial court explicitly instructed the jury that damages should include such "reasonable expenses" which "arise naturally and proximately from the access problem" to the subdivision and "are reasonably definite and certain, excluding any costs or attorney's fees in the prosecution of this action." Thus the jury was

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explicitly instructed not to include the attorneys' fees incurred by plaintiff in prosecuting this case. We hold that this instruction cured any error made by the trial court in admitting plaintiff's testimony.

III. Quotient Verdict

[3] "It is the well-established law of North Carolina that no quotient verdict exists unless the jurors reach *a prior agreement* to be bound by the average of the amount each submits as damages." *Seaman v. McQueen*, 51 N.C. App. 500, 506, 277 S.E.2d 118, 121 (1981). "While the amount of the verdict may prompt the surmise that it was a quotient verdict, it alone is insufficient to compel the conclusion, as a matter of law, that it was in fact a quotient verdict." *Collins v. Highway Com.*, 240 N.C. 627, 628, 83 S.E.2d 552, 552 (1954).

In this case, the only evidence presented that the jury reached a quotient verdict is that the amount of damages awarded was approximately one-half of the amount sought by plaintiff. There was no evidence tending to show that the jurors had made a "*prior agreement* to be bound by the average of the amount each submit[ted] as damages," which is required under North Carolina law. *Seaman*, 51 N.C. App. at 506, 277 S.E.2d at 121. Accordingly, we hold that the trial court did not err in denying defendants a new trial.

No error.

Judges LEWIS and MARTIN, John C., concur.

DEBBIE F. SMITH, CATHY CAHALL AND TRACY NEWMAN, PLAINTIFFS V. WILLIAM EDWARD PRIVETTE, INDIVIDUALLY; WHITE PLAINS UNITED METHODIST CHURCH; THE RALEIGH DISTRICT OF THE NORTH CAROLINA CONFERENCE OF THE UNITED METHODIST CHURCH, AND THE NORTH CAROLINA CONFERENCE OF THE UNITED METHODIST CHURCH, DEFENDANTS

No. COA97-199

(Filed 3 February 1998)

Constitutional Law § 119 (NCI4th); Labor and Employment § 204(NCI4th)—church minister—negligent retention and supervision—First Amendment not implicated

Claims by former church employees against a church and church organizations for negligent retention and supervision of a

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minister based upon sexual misconduct by the minister toward the former employees were not barred by the free exercise of religion clause of the First Amendment since the court will not be required to interpret or weigh church doctrine in adjudicating those claims. U.S. Const. amend. I.

Appeal by plaintiffs from order and judgment filed 31 October 1996 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 17 November 1997.

Joyce L. Davis and Associates, by Joyce L. Davis, Zoe G. Mahood, and Dorothy Powers, for plaintiffs appellants.

Nicholls & Crampton, P.A., by Robin Adams Anderson, for defendant appellee White Plains United Methodist Church.

Elrod Lawing & Sharpless, P.A., by Frederick K. Sharpless, for defendants appellees the Raleigh District of the North Carolina Conference of the United Methodist Church and the North Carolina Conference of the United Methodist Church.

GREENE, Judge.

Debbie F. Smith (Plaintiff Smith), Cathy Cahall (Plaintiff Cahall), and Tracy Newman (Plaintiff Newman) (collectively referred to herein as Plaintiffs) appeal from an order and judgment dismissing their negligent retention and supervision claim because of lack of subject matter jurisdiction against the White Plains United Methodist Church of Cary (Defendant White Plains), the Raleigh District of the North Carolina Conference of the United Methodist Church (Defendant District), and the North Carolina Conference of the United Methodist Church (Defendant Conference) (Defendant White Plains, Defendant District, and Defendant Conference being collectively referred to herein as the "Church Defendants").

William E. Privette (Privette) and the Church Defendants filed a motion under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure seeking to have the complaint dismissed for lack of subject matter jurisdiction, contending that the claims stated in the complaint are barred by the First Amendment of the United States Constitution, which prohibits any "law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. Const. amend. I. At the hearing on the motions to dismiss, the trial court considered the pleadings and the affidavit of Kermit Braswell.

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The complaint contains allegations that the Plaintiffs were employed in clerical positions at the Defendant White Plains, where Privette was the Senior Pastor; that Privette was ordained by the Defendant Conference; that the Defendant Conference and the Defendant District were responsible for the placement and oversight of Privette, and that they assigned him to the Defendant White Plains and the Defendant White Plains paid his salary; that Privette committed inappropriate, unwelcome, offensive and nonconsensual acts of a sexual nature against the Plaintiffs, variously hugging, kissing and touching them, and made inappropriate, unwelcome, offensive and nonconsensual statements of a sexually suggestive nature to them; that Privette's acts and statements toward the Plaintiffs amount to sexual harassment and assault and battery, causing the Plaintiffs emotional distress, embarrassment, humiliation, and damage to their reputations, professional standing, and career potential. The complaint further states that the Church Defendants knew or should have known of Privette's propensity for sexual harassment of and assault and battery upon female employees and that they failed to take any actions to warn or protect the Plaintiffs from Privette's tortious activity.

Kermit Braswell, District Superintendent of the Raleigh District of the Church Defendants, affirmed in his affidavit that the episcopacy and principle of itinerant general superintendency prescribed by the Constitution of the United Methodist Church are fundamental to the faith of the church; that the appointment and assignment of ordained ministers to local churches by the bishop of the Defendant Conference is part of the principle of itinerant general superintendency; and that the *Book of Discipline*, prescribed by the United Methodist Church Constitution, governs the internal affairs of the United Methodist Church, the procedure for the assignment of ministers to local churches and their supervision, and the procedure for filing grievances against ministers and the disciplining thereof.

The trial court entered an order dismissing Plaintiffs' claims against the Church Defendants for lack of subject matter jurisdiction. The trial court's Memorandum of Decision stated that because the Plaintiffs contend that the Church Defendants were negligent in supervising Privette and not providing a safe working environment, "[i]t follows then that the only effective means of achieving both objectives was for the Conference when first notified of his alleged wrongful acts to have removed Reverend Privette as senior pastor of White Plains"; that the power to discipline and assign or unassign a Methodist minister is within the principle of itinerant general super-

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intendency and the exclusive power of episcopacy; and that the power of a secular court to “second guess that power to assign or unassign clergy or to second guess the discipline of clergy is an intrusion into matters of church governance and discipline . . . [and] would constitute an excessive entanglement between church and state thereby violating ‘the free exercise of religion’ clause of the First Amendment of the United States Constitution.” The trial court denied Privette’s motion to dismiss.

The dispositive issue is whether the First Amendment precludes the filing of a negligent retention and supervision claim against a religious organization, when that claim is based on the conduct of a cleric of that organization.

Lack of subject matter jurisdiction challenges the court’s statutory or constitutional power to adjudicate a claim and can be raised at any level of the proceeding. N.C.G.S. § 1A-1, Rule 12(h)(3) (1990); *see Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). “[U]nlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation [of a Rule 12(b)(1) motion] to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing.” 2 James W. Moore et al., *Moore’s Federal Practice*, § 12.30[3] (3d ed. 1997) [hereinafter 2 *Moore’s Federal Practice*]; *see Cline v. Teich*, 92 N.C. App. 257, 264, 374 S.E.2d 462, 466 (1988). If the evaluation is confined to the pleadings, the court must “accept the plaintiff’s allegations as true, construing them most favorably to the plaintiff.” 2 *Moore’s Federal Practice*, § 12.30[4]. Unlike a Rule 12(b)(6) motion, consideration of matters outside the pleadings “does not convert the Rule 12(b)(1) motion to one for summary judgment” *Id.* An appellate court’s review of an order of the trial court denying or allowing a Rule 12(b)(1) motion is *de novo*, except to the extent the trial court resolves issues of fact and those findings are binding on the appellate court if supported by competent evidence in the record. 2 *Moore’s Federal Practice*, § 12.30[5].

In this case the Church Defendants argue that the trial court is without subject matter jurisdiction to adjudicate the Plaintiffs’ claims against them because the trial court’s resolution of these claims necessarily requires inquiry into their religious doctrine and that such an inquiry is not permitted under the First Amendment to the United States Constitution. We disagree.

The First Amendment to the United States Constitution prohibits any “law respecting an establishment of religion, or prohibiting the

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free exercise thereof" U.S. Const. amend. I. The United States Supreme Court has interpreted this clause to mean that the civil courts cannot decide disputes involving religious organizations where the religious organizations would be deprived of interpreting and determining their own laws and doctrine. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 20 L. Ed. 666 (1871) (establishing doctrine of judicial abstention in matters which involved interpretation of religious law and doctrine); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 97 L. Ed. 120 (1952) (state law which placed ownership of church property in one faction of the Russian Orthodox Church was unconstitutional as it impeded on the authority of the church leaders to decide the issue themselves); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 21 L. Ed. 2d 658 (1969) (civil courts may intervene in internal church property dispute when neutral principles of law could be applied without interpreting and determining religious doctrine).

The First Amendment, however, does not grant religious organizations absolute immunity from liability. For example, claims against religious organizations have long been recognized for premises liability, breach of a fiduciary duty, and negligent use of motor vehicles. Carl H. Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. Va. L. Rev. 1, 76 (1986); *Moses v. Diocese of Colorado*, 863 P.2d 310, 319 (Colo. 1993), cert. denied, 511 U.S. 1137, 128 L. Ed. 2d 880 (1994). Indeed, the "[a]pplication of a secular standard to secular conduct that is tortious is not prohibited by the Constitution." *Moses*, 863 P.2d at 320; see also *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872, 108 L. Ed. 2d 876 (1990) (finding that even religiously motivated conduct does not have complete immunity from neutral laws which are generally applied). The dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine. If not, the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim. *See Serbian Eastern Orthodox Diocese for the U.S. and Canada v. Milivojevich*, 426 U.S. 696, 710, 49 L. Ed. 2d 151, 163 (1976).

North Carolina recognizes a cause of action for negligent supervision and retention as an independent tort based on the employer's liability to third parties. *Braswell v. Braswell*, 330 N.C. 363, 373, 410 S.E.2d 897, 903 (1991). To support a claim of negligent retention and supervision against an employer, the plaintiff must prove that "the incompetent employee committed a tortious act resulting in injury to

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plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency." *Graham v. Hardee's Food Systems*, 121 N.C. App. 382, 385, 465 S.E.2d 558, 560 (1996) (quoting *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 495, 340 S.E.2d 116, 124, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986)).

We acknowledge that the decision to hire or discharge a minister is inextricable from religious doctrine and protected by the First Amendment from judicial inquiry. We do not accept, however, that resolution of the Plaintiffs' negligent retention and supervision claim requires the trial court to inquire into the Church Defendants' reasons for choosing Privette to serve as a minister. The Plaintiffs' claim, construed in the light most favorable to them, instead presents the issue of whether the Church Defendants knew or had reason to know of Privette's propensity to engage in sexual misconduct, *see Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315, 1323 (Colo. 1996), *cert. denied*, — U.S. —, 137 L. Ed. 2d 1049 (1997), conduct that the Church Defendants do not claim is part of the tenets or practices of the Methodist Church. Thus, there is no necessity for the court to interpret or weigh church doctrine in its adjudication of the Plaintiffs' claim for negligent retention and supervision. It follows that the First Amendment is not implicated and does not bar the Plaintiffs' claim against the Church Defendants. Certainly,

a contrary holding—that a religious body must be held free from any responsibility for wholly predictable and foreseeable injurious consequences of personnel decisions, although such decisions incorporate no theological or dogmatic tenets—would go beyond First Amendment protection and cloak such bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded.

Jones v. Trane, 591 N.Y.S.2d 927, 932 (1992).

The trial court thus erred in granting the Rule 12(b)(1) dismissal and this case must be remanded to the trial court.

Reversed and remanded.

Chief Judge ARNOLD and Judge McGEE concur.

HARRINGTON v. ADAMS-ROBINSON ENTERPRISES

[128 N.C. App. 496 (1998)]

IN RE: PERRY HARRINGTON, EMPLOYEE, PLAINTIFF-APPELLANT v. ADAMS-ROBINSON ENTERPRISES, EMPLOYER, WAUSAU INSURANCE COMPANY, CARRIER, DEFENDANT-APPELLEES

No. COA97-452

(Filed 3 February 1998)

Workers' Compensation § 235 (NCI4th)— temporary total disability—Form 21 agreement—release by physicians—presumption of continuing disability not rebutted

Evidence that plaintiff was released by his doctors to return to work did not support a finding that plaintiff was able to return to work at wages equal to those he was earning at the time of his injury and thus did not rebut the presumption from the entry of a Form 21 agreement for temporary total disability that plaintiff's disability continues until he returns to work at the same wage he was earning prior to his injury.

Judge WALKER dissenting.

Appeal by plaintiff from opinion and award entered 29 October 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 January 1998.

On 24 August 1993, plaintiff suffered compensable injuries to his neck, knee and back while working as a carpenter with defendant-employer. Plaintiff was being transported to a job site in the back of his employer's pick-up truck and was injured when his head slammed into the passenger compartment back glass. On 7 October 1993, the parties entered into a Form 21 agreement in which the parties stipulated and agreed that the claimant was injured while in the scope of his employment and was entitled to workers' compensation benefits for his temporary total disability from 28 August 1993 and continuing for "nec." weeks.

On 8 September 1993, plaintiff began treatment with Dr. Timothy Holcomb, a chiropractor. Plaintiff was treated by Dr. Holcomb until December 1993 at which time he was given permission to return to work with no restrictions. Dr. Holcomb felt plaintiff had reached a maximum medical improvement on 22 December 1993. Dr. Holcomb referred plaintiff to a Dr. Ibrahim Oudeh, M.D., who also treated him for lower back pain. According to Dr. Oudeh's medical reports, he saw plaintiff six times in 1994 for follow-up visits. In November 1993,

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[128 N.C. App. 496 (1998)]

plaintiff's employer sent him to Dr. Michael D. Gwinn, M.D., who recommended an aggressive back rehabilitation program. On 13 December 1993, Dr. Gwinn permitted the plaintiff to perform light duty work with no lifting over 25 pounds. At this time, plaintiff returned to defendant-employer and asked to do light work around the job site. The employer told plaintiff: "If you don't have a full release from the doctor, don't even think about coming back out here."

In January 1994 on the recommendation of Dr. Gwinn, plaintiff went to see Dr. Lestini, an orthopaedic surgeon, who performed various Waddle tests on plaintiff to determine if there was symptom magnification or malingering on the part of the plaintiff. The doctor noted inconsistencies in plaintiff's responses. In January 1994, plaintiff returned to see Dr. Gwinn. Dr. Gwinn felt that plaintiff had reached maximum medical improvement and had sustained a five percent permanent partial impairment. On 18 January 1994, Dr. Gwinn released plaintiff to return to regular work. On 28 June 1994, plaintiff returned to Dr. Gwinn complaining of pain. Dr. Gwinn noticed inconsistencies in plaintiff's behavior. Dr. Gwinn noted that plaintiff exhibited a great deal of pain behavior, including moaning and groaning loudly as he moved around the examination room, but that he was able to climb on and off the exam table and change positions between sitting and lying and rolling over without apparent difficulty. Dr. Gwinn again saw no reason to put restrictions on plaintiff's work activities.

On 19 July 1994, the defendant-employer filed Form 24, an application to stop payment of workers' compensation benefits to plaintiff, and the Industrial Commission approved the application 4 August 1994. Plaintiff requested a hearing and his action was heard on 2 May 1995. The Deputy Commissioner decided that plaintiff's benefits should have been terminated after 18 January 1994 and denied plaintiff's claim for any further workers' compensation benefits. Further, the Deputy Commissioner determined that the defendant-employer was entitled to a credit for the overpayment of temporary total disability benefits between 17 January 1994 and 4 August 1994, when the Form 24 was approved. Plaintiff appealed to the Full Commission. After examining all the evidence, the Full Commission affirmed the Deputy Commissioner's opinion and award terminating plaintiff's temporary total disability payments effective 18 January 1994. Plaintiff appeals.

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[128 N.C. App. 496 (1998)]

*Brenton D. Adams for plaintiff-appellant.**Teague, Campbell, Dennis & Gorham, L.L.P., by Gregory M. Willis, for defendant-appellees.*

EAGLES, Judge.

We first consider whether plaintiff's benefits should have been terminated after 18 January 1994. Plaintiff has the initial burden of proving he was rendered disabled as a result of a work related injury. *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 475, 374 S.E.2d 483, 485 (1988). The term "disability" means "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." G.S. 97-2(9). Accordingly, in *Hilliard v. Apex Cabinet Co.*, our Supreme Court ruled that in order to find a worker disabled under the Act the Commission must find:

- (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,
- (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and
- (3) that this individual's incapacity to earn was caused by plaintiff's injury.

305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). However, once a Form 21 agreement is signed the employee is presumed totally disabled. *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 205, 472 S.E.2d 382, 386 (1996), cert. denied, 344 N.C. 629, 477 S.E.2d 39 (1996). Once the disability is shown or stipulated by entry of a Form 21 agreement, there is a presumption that it continues until the employee returns to work at wages equal to those he was receiving at the time his injury occurred. *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971); *Tucker v. Lowdermilk*, 233 N.C. 185, 189, 63 S.E.2d 109, 112 (1951). Likewise there is a presumption that a disability ends when the employee returns to work at the same wages. *Id.*

Upon a showing of disability by the employee, the employer must produce evidence that suitable jobs are available for the employee and that the employee is capable of getting a job. *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994); *Kennedy v. Duke Univ. Medical Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990). A job is "suitable" if the employee is able to perform

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the job, given her “age, education, physical limitations, vocational skills, and experience.” *Franklin*, 123 N.C. App. at 206, 472 S.E.2d at 386 (quoting *Burwell*, 114 N.C. App. at 73, 441 S.E.2d at 149). A finding of a maximum medical improvement is not the equivalent of finding that the employee is able to earn the same wage and does not satisfy the defendant’s burden of disproving an employee’s disability. *Watson*, 92 N.C. App. at 476, 374 S.E.2d at 485.

Plaintiff argues that the Industrial Commission erred by failing to apply the presumption that the plaintiff’s temporary total disability continues until he or she returns to work at the same wage earned prior to the injury. We agree.

Here, plaintiff has carried his initial burden of showing that he was disabled. The defendants have admitted liability by entering into the Form 21 agreement. Plaintiff began to receive benefits for his temporary total disability on 28 August 1993 and continuing for “necessary weeks.” By January 1994, three doctors had released plaintiff to return to work. However, “[a]n employee’s release to return to work is not the equivalent of a finding that the employee is able to earn the same wage earned prior to the injury, nor does it automatically deprive an employee of the benefit of the *Watkins v. Motor Lines* presumption.” *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994). As in *Radica*, there is no evidence to support a finding that the plaintiff retained any earning capacity after he was released by his doctors. The defendant-employer has not met its burden of proving that the plaintiff-employee was capable of earning the same wages. A release from a doctor is not enough to rebut the presumption of a disability. Accordingly, the Full Commission erred when it terminated plaintiff’s benefits after 18 January 1994.

Reversed.

Judge WYNN concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I respectfully dissent from the majority opinion holding that the North Carolina Industrial Commission (the Commission) erred when it terminated plaintiff’s benefits after 18 January 1994.

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Included in the Commission's findings were the following:

8. On 17 January 1994 Dr. Gwinn opined that plaintiff had reached maximum medical improvement and released plaintiff from his care to return to work on 18 January 1994. . . .

9. . . . [P]laintiff has remained capable of returning to unrestricted work, including his regular carpenter's job, since 18 January 1994.

10. Although he has been released to return to unrestricted work plaintiff has not applied for work because he contends that he is no longer capable of the heavy work required by the type of carpenter job he had when he was injured. He also contends that the light work he admits to being capable of performing would pay substantially less than the \$10.00 an hour he was earning as a carpenter and would not be appropriate for someone of his education.

. . .

13. On 20 July 1994 defendants filed a Form 24 Application of Employer or Insurance Carrier to Stop Payment of Compensation, which was approved by the Commission on 4 August 1994. . . .

Further, the deputy commissioner had found plaintiff's testimony as to continuing pain was not credible.

In the recent case of *In re Stone v. G & G Builders*, 346 N.C. 154, 157, 484 S.E.2d 365, 367 (1997), our Supreme Court, in reversing this Court and reinstating the opinion and award of the Industrial Commission stated:

In order to qualify for compensation under the Workers' Compensation Act, a claimant must prove both the existence and the extent of disability. In the context of a claim for workers' compensation, disability refers to the impairment of the injured employee's earning capacity. "If an award is made by the Industrial Commission, payable during disability, there is a presumption that disability lasts until the employee returns to work. . . ." However, as stated in Rule 404(1) of the Workers' Compensation Rules of the North Carolina Industrial Commission, this presumption of continuing disability is rebuttable. In the instant case the parties entered into a Form 21 Agreement which was approved by the Commission on 24 April

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1992. On 13 November 1992 defendants' Form 24 application to stop payment was approved by the Commission. Any presumptions existing in favor of the employee were rebutted by defendants in this case through medical and other evidence.

(Citations omitted).

Here, the Commission's findings adequately established that the presumption existing in favor of the plaintiff was rebutted by the defendant through medical and other evidence.

I would affirm the opinion and award of the Industrial Commission.

DEBORAH K. DIXON, EMPLOYEE, PLAINTIFF APPELLANT v. CITY OF DURHAM,
SELF-INSURED EMPLOYER, DEFENDANT APPELLEE

No. COA96-1180

(Filed 3 February 1998)

Workers' Compensation § 297 (NCI4th)—injury while police officer—offer of another position—same wage without income advancement—justified refusal—further disability compensation

Plaintiff, who was injured while working as a city police officer II, was justified in refusing the city's offer of a water meter reader trainee position and thus was not barred by N.C.G.S. § 97-32 from receiving further disability compensation because the offered position was not "suitable" to plaintiff's earning capacity where plaintiff was offered the same salary as her police officer II salary but without a similar opportunity for income advancement, and there was no evidence that another employer would hire plaintiff for a similar position at a comparable wage level.

Appeal by plaintiff from Opinion and Award entered 29 May 1996 by the Full Industrial Commission. Heard in the Court of Appeals 17 November 1997.

Plaintiff began work as a police officer for the City of Durham in 1989. In April 1993, plaintiff was on duty as a police officer II when she responded to an emergency call. During the course of that assign-

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ment, plaintiff suffered a serious cut by broken glass to her right wrist. After extended treatment, including surgery, physicians determined that plaintiff has a 20 percent permanent partial disability of her right hand. Because plaintiff's right hand is her dominant hand, she can no longer safely perform her duties as a police officer II: She cannot handle a gun safely and could not restrain suspects or otherwise adequately protect herself and others in the dangerous situations that are necessarily a part of the job of a police officer II.

Defendant notified plaintiff by letter 28 July 1994 that it was unable to place her in a position consistent with her physical limitations. Defendant gave plaintiff the options of resignation, medical disability retirement or termination due to inability to perform her job. Plaintiff chose medical disability retirement. At the time of her retirement, she had been earning an average weekly wage of \$539.63.

After her retirement, plaintiff worked for another employer for a short time at an average weekly wage of \$146.25. She left that job in fall 1994 to attend North Carolina State University, where she had been admitted to the School of Design.

In December 1994, defendant offered plaintiff a position as water meter-reader trainee at the same dollar salary as her police officer II salary, but without a similar opportunity for income advancement. Plaintiff rejected the position and sought compensation for her permanent partial disability.

Plaintiff's case was heard by a Deputy Commissioner of the North Carolina Industrial Commission. The Deputy Commissioner found in November 1995 that plaintiff's refusal to accept defendant's offer of employment as a water meter-reader trainee was unjustified and barred plaintiff, pursuant to N.C. Gen. Stat. § 97-32, from receiving additional disability compensation. Plaintiff appealed to the Full Commission.

The Full Commission declined to receive further evidence, made its own findings of fact and conclusions of law and entered an Opinion and Award in May 1996, upholding the Opinion and Award of the Deputy Commissioner. Plaintiff appeals.

Edelstein and Payne, by M. Travis Payne, for the plaintiff appellant.

Brooks, Stevens & Pope, P.A., by Kathlyn C. Hobbs and Patricia Wilson Medynski, for defendant appellee.

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ARNOLD, Chief Judge.

"The findings of the Industrial Commission are conclusive on appeal when supported by competent evidence even though there be evidence to support a contrary finding. However, the Commission's legal conclusions are reviewable by the appellate courts." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982) (citations omitted).

When an injured employee seeks compensation under the Workers' Compensation Act, she must show that she was incapable after her injury of earning the same wages she had earned before the injury. *Id.*, 290 S.E.2d at 683. She may meet her burden in one of four ways:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Product Distribution, 108 N.C.App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). Defendant argues forcefully that plaintiff failed to meet any one of the four means of proving disability set out in *Russell*. However, the Industrial Commission found as fact that plaintiff obtained post-injury employment at an average weekly wage of \$146.25. Finding nothing in the record before us to undermine the Commission's finding, we conclude that plaintiff met her burden of proof under the fourth option set out in *Russell*.

Plaintiff assigns error to the Commission's conclusion of law that plaintiff's refusal of the water meter-reader trainee position was not justified under G.S. § 97-32 and that it barred her from receiving compensation for her permanent partial disability.

N.C. Gen. Stat. § 97-32 provides that "[i]f an injured employee refuses employment procured for him *suitable to his capacity* he shall not be entitled to any compensation at any time during the con-

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tinuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." G.S. § 97-32 (1991) (emphasis added).

Plaintiff argues that the water meter-reader trainee position is not suitable to her physical limitations. Upon a thorough review of the record, we find competent evidence to support a conclusion that the job is within plaintiff's physical capacity. Thus, we do not disturb the commission's conclusion on that ground.

However, a review of case law shows that "suitability" under G.S. § 97-32 is not limited to a consideration of physical suitability. In *McLean v. Eaton Corp.*, 125 N.C. App. 391, 481 S.E.2d 289 (1997), this Court said the Industrial Commission must consider psychological disability as well as physical disability in determining whether a job offered to an injured employee "suitable to his capacity" under G.S. § 97-32. *McLean*, 125 N.C. App. at 394, 481 S.E.2d at 291. The similarity of the wages or salary of the pre-injury employment and the post-injury job offer also is among the factors considered. See *Blankley v. White Swan Uniform Rentals*, 107 N.C. App. 751, 755, 421 S.E.2d 603, 605 (1992), disc. review denied, *Blankley v. White Swan Uniform Rentals*, 333 N.C. 461, 427 S.E.2d 618 (1993) (where the Industrial Commission had listed amount of pay as a factor to be considered in determining whether an employee was justified in refusing an offered job).

In considering the wages or salary of a pre-injury job and a post-injury job offer, common sense and fairness dictate examination not only of the actual dollar amount paid at a given time, but also of the potential for advancement or, in other words, capacity for income growth. In this case, a job (water meter-reader trainee) with no potential for income growth for plaintiff is not sufficiently similar to a job (police officer II) with income-growth potential of approximately \$8,000.

Defendant's risk manager, Laura Henderson, testified in this case that, typically, when a city employee is moved into a job at a higher salary than the job normally would pay, the employee gets no salary increases until the normal salary for the position "catches up," through city salary upgrades and cost-of-living increases, with the amount the employee is being paid. The salary for the water meter-reader trainee position offered to plaintiff ranges from an entry-level salary of \$16,797.30 to a maximum of \$24,285.56, assuming no promotions. In this case, plaintiff was making \$30,118.92 as a police offi-

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cer II. According to testimony by Ms. Henderson, if plaintiff accepted the water meter-reader trainee position, plaintiff would be paid \$30,118.92, but could not expect a pay increase until the city increased the maximum salary for the water meter-reader trainee position from \$24,285.56 to more than \$30,118.92. In other words, Henderson testified, plaintiff would be frozen out of opportunities for pay increases that she might have received had she been able to keep her pre-injury job as a police officer. Even if plaintiff was promoted two levels from water meter-reader trainee to water meter reader II, she would have a job that topped out at \$26,446.94 on the city's pay scale. She still would have no opportunity for income growth, regardless of job performance.

By contrast, if plaintiff had not been injured and had remained at the level of police officer II, with no promotion, she would have been eligible for salary increases up to \$38,489.10. If she achieved two promotions to police sergeant (analogous to a two-level promotion to water meter reader II), she would have been eligible for salary increases up to \$44,090.02. Clearly, plaintiff would have a substantially reduced earning capacity in the water meter-reader trainee job offered by the city. The post-injury job offered by defendant was not "suitable" to plaintiff's earning capacity under G.S. § 97-32.

This analysis is consistent with our Supreme Court's holding in *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986). The *Peoples* court interpreted earning capacity in the context of G.S. § 97-2(9), the Workers' Compensation Act statute that defines disability. *Peoples* held that "[p]roffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level." *Peoples*, 316 N.C. at 438, 342 S.E.2d at 806. "The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 764-5, 487 S.E.2d 746, 750 (1997), quoting *Peoples*, 316 N.C. at 438, 342 S.E.2d at 806. The record before this Court contains no evidence that another employer would hire plaintiff as a water meter reader at a salary of more than \$30,000. To the contrary, witness Lisa Ward-Ross testified as an expert in vocational evaluation and rehabilitation that no entry-level water meter-reader jobs are available in the North Carolina job market at a salary of \$30,000.

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"A canon of statutory interpretation is that statutes dealing with the same subject matter must be construed together and harmonized, if possible, to give effect to each." *Peoples*, 316 N.C. at 444, 342 S.E.2d at 810.

The plain language of G.S. § 97-32 states that a post-injury job offered by an employer to the injured employee must be "suitable to his capacity." In determining what is "suitable," our courts consider similarity of the wages or salary of the pre-injury employment and the post-injury job offer. And *Peoples* requires that earning capacity be measured by whether other employers would hire the employee in the proffered job at a comparable wage level. *Peoples*, 316 N.C. at 438, 342 S.E.2d at 806.

The post-injury job offered by defendant is not "suitable" to plaintiff's capacity pursuant to G.S. § 97-32 and related statutes and case law. Plaintiff was justified in rejecting it.

Reversed and remanded for an Opinion and Award consistent with this opinion.

Reversed and remanded.

Judges GREENE and McGEE concur.

STATE OF NORTH CAROLINA v. KEMUND LAMONT LEE, DEFENDANT

No. COA97-302

(Filed 3 February 1998)

1. Criminal Law § 504 (NCI4th Rev.)—fingerprint card—jury view in open court—no abuse of discretion

In a prosecution for second-degree rape, first-degree burglary, and robbery with a dangerous weapon, the trial judge did not abuse its discretion by allowing the jury to view a fingerprint card in open court after it began its deliberations despite the parties' objections to a jury request to view the card where the trial judge's decision was based on the fact that the fingerprint had been admitted into evidence and there was no eyewitness identification of defendant. N.C.G.S. § 15A-1233(b).

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2. Robbery § 66 (NCI4th)— armed robbery—threat to use gun—sufficient evidence

There was sufficient evidence that defendant threatened to use a gun to support his conviction of armed robbery where the evidence at trial showed that defendant purposely covered the victim's face during the robbery, threatened the victim that he would shoot her if she resisted him, and asked during the robbery where he had dropped his gun. N.C.G.S. § 14-87(a).

3. Evidence and Witnesses § 1865 (NCI4th)— fingerprint—impression at time of crime—sufficient evidence

There was sufficient evidence for a jury to conclude that defendant's fingerprints were impressed on a greeting card while committing a crime at the victim's residence where the evidence showed that (1) defendant's fingerprint was found on a card which was concealed in a private location at the victim's residence; (2) the card had been mailed to the victim from a remote location; (3) the victim told defendant during the assault about a card containing money in a dresser drawer; (4) the victim heard defendant fumbling around in the drawer and the money was gone from the card after defendant left; and (5) the victim did not know defendant, had not seen him before, and had never authorized defendant to lawfully possess the card.

Appeal by defendant from judgment entered 16 July 1996 by Judge Stafford G. Bullock in Wake County Superior Court. Heard in the Court of Appeals 6 January 1997.

Defendant was convicted of second degree rape, first degree burglary, and robbery with a dangerous weapon. He was sentenced to a minimum of 101 months and a maximum of 131 months for the first degree burglary and robbery with a dangerous weapon and a minimum sentence of 115 months and a maximum sentence of 147 months for the second degree rape charge.

At trial the evidence tended to show that on 22 September 1995, Ann Green was alone in her apartment in Raleigh. Around 2:30 a.m., she was in bed when defendant jumped on her. The victim felt coarse hair on the defendant's head and gloves on his hands. After a brief struggle, defendant covered the victim's head with a pillow. Defendant told her that if she resisted he would shoot her. Defendant then knocked the victim onto the floor and put a T-shirt over her head. Defendant asked the victim for money. The victim told defend-

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ant that there was money in her jeans pocket and in a greeting card sent to the victim by her mother. The card was located in a dresser drawer. The victim testified that she heard the defendant fumbling around in the dresser drawer and when she checked later the money in her pocket as well as in the greeting card was gone.

The victim also testified that during the attack she had the opportunity to feel defendant's hands and that at some point he had removed the gloves. After the victim heard defendant fumbling around in the dresser drawer, the defendant removed the victim's pajama bottoms, unbuckled his belt and raped the victim. The defendant then heard a noise and left the apartment.

Sidney Johnson, a Deputy Sheriff with the City County Bureau of Identification, processed the apartment for latent fingerprints. Deputy Johnson found a latent fingerprint on a greeting card on top of the dresser in the victim's room. Marty Ludas, a latent print examiner with the City County Bureau of Identification, and Haywood R. Starling, a fingerprint identification expert and former director of the North Carolina State Bureau of Investigation, each testified that in his expert opinion, the latent fingerprint was made by the defendant's finger. The State then rested. Upon the defendant's motion to dismiss the charges, the trial court dismissed the first degree rape charge. The State proceeded on second degree rape, robbery with a dangerous weapon, and first degree burglary. Defendant introduced the laboratory report from the rape kit into evidence. The report indicated that there was no semen, hair or blood exchanged. The defendant rested. After beginning deliberations, the jury requested they be allowed to look at the fingerprint card. Both the State and the defense objected to the publication of the fingerprint card. The trial court overruled both objections and allowed the jury to examine the fingerprint card in the courtroom. The jury returned a guilty verdict as to all charges. Defendant appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Daniel D. Addison, for the State.

John T. Hall for defendant-appellant.

EAGLES, Judge.

[1] We first consider whether the trial court erred in permitting the jury, at its request, to view the fingerprint card containing fingerprints obtained at the scene of the crime. Defendant argues that the

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trial court erred by allowing the jury, after beginning their deliberation, to examine State's Exhibit number one, a fingerprint card containing the latent print obtained from the greeting card found in the apartment of the victim, Ms. Green. We disagree.

If a jury after retiring requests to review the evidence, the judge in his discretion, after notice to the prosecutor and defendant, may permit the jury to examine in open court any requested materials which have been admitted into evidence. G.S. 15A-1233(a). By contrast, G.S. 15A-1233(b) provides: "Upon request by the jury and with the consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received into evidence." In order for the trial judge to allow the jury to take the requested evidence into the deliberation room, the judge must have consent from both the State and the defendant. However, if the judge simply lets the jury examine the requested evidence in open court but does not allow the jury to take it into the jury room, there is no necessity for obtaining the consent of the parties.

Here, the judge permitted the jury, as it requested, to view in **open court** the fingerprint card containing the defendant's latent fingerprint. The judge specifically denied the jury's request to take the fingerprint card back into the jury room. Accordingly, this assignment of error fails.

In order to show that the trial judge erred in permitting the jury, without consent of the State and the defendant, to view the evidence in the courtroom, defendant must show that the trial court abused its discretion. G.S. 15A-1233(b). To show an abuse of discretion, "defendant must demonstrate that the trial court's action was so arbitrary that it could not have been the result of a reasoned decision." *State v. Cannon*, 341 N.C. 79, 87, 459 S.E.2d 238, 243 (1995) (quoting *State v. Weddington*, 329 N.C. 202, 209, 404 S.E.2d 671, 676 (1991) (quoting *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985))).

Here, the trial judge's decision was based on the fact that the fingerprint card had been admitted into evidence and that there was no eyewitness identification of defendant. Given the significance of the fingerprint identification evidence, the trial judge's decision is a reasoned one. Accordingly, we conclude the trial court did not abuse its discretion and this assignment of error is overruled.

[2] We next consider whether the trial court erred in denying defendant's motion to dismiss. Defendant asserts that the evidence intro-

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duced at trial was insufficient to support the charges and convictions. Defendant argues that the victim was unable to identify him as the perpetrator.

Concerning defendant's motion to dismiss the charge of robbery with a dangerous weapon, defendant argues that there was insufficient evidence that defendant had a firearm at the time of the robbery. Defendant argues that because the trial judge dismissed the first degree rape charge for insufficient evidence of a firearm, the judge was required to dismiss the armed robbery charge for the same reason. We disagree.

A defendant may be convicted of first degree rape if, while committing the crime, he "*employs or displays* a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon." G.S. 14-27.2. (Emphasis added). By contrast, a defendant may be convicted of armed robbery if he commits the robbery "having in possession or with *the use or threatened use*" of any firearm or other dangerous weapon. G.S. 14-87(a). (Emphasis added). To obtain a conviction for armed robbery, it is not necessary for the State to prove that the defendant displayed the firearm to the victim. Proof of armed robbery requires that the victim reasonably believed that the defendant possessed, or used or threatened to use a firearm in the perpetration of the crime. *State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979). The State need only prove that the defendant represented that he had a firearm and that circumstances led the victim reasonably to believe that the defendant had a firearm and might use it. *State v. Williams*, 335 N.C. 518, 522, 438 S.E.2d 727, 729 (1994).

In *State v. Williams*, the Court concluded that the defendant's verbal representations to his victims that he had a firearm and that he would shoot them entitled the State to a presumption that the defendant used a firearm.

[W]here there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon *and nothing to the contrary appears in the evidence*, the presumption that the victim's life was endangered or threatened is mandatory.

Williams, 335 N.C. at 521, 438 S.E.2d at 728. Here, defendant purposely covered the victim's face during the robbery. He told Ms. Green several times that he would shoot her if she resisted. At one

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point during the robbery and assault, defendant even said "Where did I drop my gun?" In addition, the defendant only introduced evidence relating to the results of the rape kit. Accordingly, we hold there was substantial evidence showing the defendant threatened to use a gun, and "*the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed." *Williams*, 335 N.C. at 521, 438 S.E.2d at 728. This assignment of error is overruled.

[3] Defendant next argues that there was insufficient evidence to show that he left his fingerprint on the victim's greeting card at the time of the crimes charged. Defendant also argues that he could have touched the card somewhere else. We disagree.

"Testimony by a qualified expert that fingerprints found at the scene of the crime corresponded with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed," is sufficient to withstand a motion to dismiss. *State v. Scott*, 296 N.C. 519, 523, 251 S.E.2d 414, 417 (1979). There is substantial evidence to meet this requirement if the occupant of the premises, who might reasonably be expected to have seen the defendant had he ever been present lawfully, has been able to testify that she had never given defendant permission to come on the premises and had never seen him there before the commission of the crime. *Id.* This kind of evidence is particularly convincing when the crime scene is a private residence not accessible to the general public.

Here, there was evidence that 1) defendant's fingerprint was found on a card which was in a concealed location in a private residence; 2) the card had been mailed to Ms. Green from a remote location; 3) Ms. Green told the defendant during the assault about a card containing money in a dresser drawer; 4) the victim heard the defendant fumbling around in the drawer and the money was gone from the card after the defendant left; and 5) Ms. Green did not know the defendant, had not seen him before, and had never authorized him to lawfully possess the greeting card. This is sufficient evidence for a jury to conclude that the defendant left his fingerprint on the card while committing the crimes. Accordingly, this assignment of error is overruled.

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Affirmed.

Judges WYNN and WALKER concur.

WILLIAM JARVIS WIGGS, JR., PLAINTIFF v. KATHY G. WIGGS, DEFENDANT

No. COA97-282

(Filed 3 February 1998)

1. Divorce and Separation § 359 (NCI4th)— child custody—modification—lifestyle changes—impact of changes on children

An order modifying a child custody order was vacated where the court's findings were indicative of defendant's fitness as a parent but revealed nothing about the impact of lifestyle changes upon the minor children, which is the critical inquiry. The findings therefore do not support the conclusion that there was a substantial change in circumstances affecting the welfare of the children.

2. Divorce and Separation § 431 (NCI4th)— child support—income changes—changes in needs of children—no findings

An order modifying defendant's child support obligation was not supported by sufficient findings of fact of changed circumstances where the court found that plaintiff was earning more and defendant less, and that plaintiff could provide medical insurance less expensively, but made no findings regarding any changes in the needs of the minor children. Although a substantial decrease in the non-custodial parent's income can support a modification without a showing of a change in the needs of the child, the decrease in defendant's income in this case was not substantial.

Appeal by plaintiff from order entered 10 December 1996 by Judge Sarah F. Patterson in Nash County District Court. Heard in the Court of Appeals 5 January 1998.

Godwin & Spivey, by W. Michael Spivey, for plaintiff-appellant.

Wm. Lewis King for defendant-appellee.

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[128 N.C. App. 512 (1998)]

MARTIN, John C., Judge.

The parties to this action were married 12 April 1981 and separated 10 August 1993. On 24 August 1993, the parties consented to the entry of an order providing, *inter alia*, for the custody and support of their two minor daughters. The consent order awarded primary custody of the children to plaintiff and granted defendant visitation during certain holidays and custodial periods. Additionally, defendant was ordered to pay plaintiff child support in the amount of \$315.00 per month from 1 September 1993 until 1 September 1994, \$400.00 per month from 1 September 1994 until 1 September 1995, and \$500.00 per month thereafter.

In August 1995, defendant moved for a modification of the custody, visitation and child support provisions of the prior consent order, alleging substantial changes in circumstances. After a hearing, the trial court modified the previous consent order and granted plaintiff and defendant joint custody of the children, with primary physical custody vested with plaintiff. The court also modified defendant's visitation schedule and provided for a change in defendant's child support obligations. Defendant was ordered to pay plaintiff \$373.00 for child support for November and December of 1995, \$534.00 per month from 1 January 1996 until 31 December 1996, \$127.00 per month from 1 January 1997 until 31 December 1997, and provided for payments thereafter consistent with the North Carolina Child Support Guidelines according to the then existing circumstances. Plaintiff appeals.

Plaintiff contends that the trial court erred by modifying the provisions of the previous consent order with respect to custody and support of the minor children because its findings of fact do not support its conclusion that there was a substantial change of circumstances justifying modification of those provisions. We agree.

I. Custody

[1] A party seeking modification of a child custody order, as defendant does in this case, bears the burden of proving the existence of a substantial change in circumstances affecting the welfare of the child or children. *Crosby v. Crosby*, 272 N.C. 235, 158 S.E.2d 77 (1967). In order to meet this burden, such party must prove that "circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified." *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 77, 418 S.E.2d 675,

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678-79 (1992) (quoting *Rothman v. Rothman*, 6 N.C. App. 401, 406, 170 S.E.2d 140, 144 (1969)). Only after evidence of a substantial change in circumstances is presented does the court entertain evidence probative of the “best interest of the child” issue. *Garrett v. Garrett*, 121 N.C. App. 192, 464 S.E.2d 716 (1995). Whether there has been a substantial change of circumstances is a legal conclusion; as such, it must be supported by adequate findings of fact, including a “nexus between the changes of circumstances and a concomitant adverse effect on the children involved.” *Id.* at 196, 464 S.E.2d at 719.

With respect to the issue of custody, the trial court found the following changes had occurred:

- A. The Defendant no longer resides with her parents, but rather now resides in a fully furnished, two bedroom mobile home, which is located on a private, secluded lot approximately $\frac{1}{4}$ mile from the home of her parents;
- B. The Defendant was formerly employed by Merck Manufacturing. As a result of factors directly and indirectly related to the separation and divorce of the parties, she was released from that employment, but now is secure in her employment with Trimeris, Inc.;
- C. Shortly after the entry of the original Consent Order in this matter, the Defendant sought and received counseling and treatment for certain emotional problems. The Defendant now exhibits a mature and stable demeanor and attitude as it relates to her life and the care and development of the minor children of the parties; and,
- D. The Plaintiff has moved his primary residence and the children from Nash County to Wilson County, thereby making it logically more difficult for the Defendant to have contact with the minor children of the parties.

While these findings are indicative of defendant’s fitness as a parent, they reveal nothing about the critical inquiry, which is the impact of the changes upon the minor children. In *Garrett*, we stated upon similar facts that “(t)he factors . . . are bare observations of plaintiff’s or defendant’s actions, not examples of how those actions adversely impact the children.” *Garrett*, at 197, 464 S.E.2d at 719. As in *Garrett*, the trial court’s findings in the present case do not establish the necessary link between the parties’ lifestyle changes and the welfare of the children and, therefore, do not support its legal conclusion that a

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substantial change in circumstances affecting the welfare of the children has occurred. Accordingly, the order modifying the previous custody order must be vacated.

II. Child Support

[2] The trial court also made findings with respect to the issue of financial support for the children. Child support orders may be modified upon a showing of changed circumstances. N.C. Gen. Stat. § 50-13.7(a), *Padilla v. Lusth*, 118 N.C. App. 709, 457 S.E.2d 319 (1995). A change in circumstances may be shown in any of several ways: a substantial increase or decrease in the child's needs, *McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995); a substantial and involuntary decrease in the income of the non-custodial parent even though the child's needs are unchanged, *Hammill v. Cusack*, 118 N.C. App. 82, 453 S.E.2d 539, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995); a voluntary decrease in income of either supporting parent, absent bad faith, upon a showing of changed circumstances relating to child oriented expenses, *Schroader v. Schroader*, 120 N.C. App. 790, 463 S.E.2d 790 (1995); and, for support orders that are at least three years old, proof of a disparity of fifteen (15) percent or more between the amount of support payable under the original order and the amount owed under North Carolina's Child Support Guidelines based upon the parties' current income and expenses. *Garrison v. Conner*, 122 N.C. App. 702, 471 S.E.2d 644, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 116 (1996); North Carolina Child Support Guidelines.

In this case, the trial judge made findings that plaintiff was earning \$18,000 per year more than he had been earning at the time of the original consent order and that defendant was earning \$500 per year less than she had been earning in 1993. The court also found that defendant had provided medical insurance for the minor children, as required by the 1993 order, at the cost of \$196.91 per month, but that such insurance could be provided by plaintiff at a cost of \$107.00 per month. The court made no findings, however, regarding any changes in the needs of the minor children since the date of the original support order. Although a substantial decrease in the non-custodial parent's income can support a modification without a showing of a change in the needs of the child, the decrease in defendant's income in this case was not substantial. Since the original support order had been in effect less than three years at the time of the hearing on defendant's motion to modify child support, she does not receive the

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benefit of the fifteen (15) percent presumption contained in the North Carolina Child Support Guidelines. The order modifying defendant's child support obligation, like the order modifying custody, is not supported by sufficient findings of fact of changed circumstances and must also be vacated.

Vacated.

Chief Judge ARNOLD and Judge SMITH concur.

WALTER KENNETH VANN, PLAINTIFF-APPELLANT v. PRANOM VANN,
DEFENDANT-APPELLEE

No. COA97-288

(Filed 3 February 1998)

Divorce and Separation § 200 (NCI4th)—absolute divorce—alimony—husband—no heightened duty to preserve marriage

In an absolute divorce action where defendant wife filed a counterclaim for alimony on the grounds of indignities as provided by N.C.G.S. § 50-16.2(7)(1987) (repealed 1995), the trial court improperly found that plaintiff husband had a heightened duty to recognize the difficulties in the marriage and that plaintiff's failure to fulfill this duty constituted indignities toward defendant. There is nothing in the case law or the General Statutes sanctioning the imposition of a heightened duty on one party to preserve the marriage solely on the basis of gender and there are no compelling circumstances in this case requiring the placement of a heightened duty on plaintiff to preserve his marriage to defendant.

Appeal by plaintiff from order entered 13 June 1996 by Judge Patricia Timmons-Goodson in Cumberland County District Court. Heard in the Court of Appeals 5 January 1998.

Richard E. Jester for plaintiff appellant.

No brief filed for defendant appellee.

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SMITH, Judge.

Plaintiff and defendant were married on 29 April 1976 and lived together as husband and wife until their separation in November of 1991. At the time of their marriage, plaintiff was serving in the United States Air Force in Thailand. Defendant, a native of Thailand, met plaintiff while working on the Air Force base. Though the parties returned to the United States in July of 1976, plaintiff continued to serve in the Air Force and traveled to various duty stations throughout the world. On 16 December 1992, plaintiff filed a complaint seeking an absolute divorce. Defendant thereafter filed a counterclaim seeking, among other things, temporary and permanent alimony on the grounds of indignities as provided for in N.C. Gen. Stat. § 50-16.2(7) (1987) (repealed 1995). The trial court ordered plaintiff to pay temporary alimony pending a hearing on the issue of permanent alimony.

After a hearing, the trial court entered an order directing plaintiff to pay defendant permanent alimony in the amount of \$150.00 per month until the death of one of the parties, defendant remarried, or through June 1997, whichever came first. The trial court based its award on the following findings of fact:

9. The plaintiff was a professional soldier who because of his career, was away from the home of the defendant and the children for months at a time. The plaintiff's absence from home for these extended periods of time substantially increased the difficulties between the plaintiff and defendant.

10. Although both the plaintiff and defendant contributed to the destruction of the marriage, the plaintiff under these circumstances had a greater duty as the husband and provider for the family to recognize the difficulties between the parties and assist in handling them, recognize them, and was insensitive to these difficulties; such constituted greater indignities to the defendant to such an extent as to render her condition intolerable and life burdensome, and without adequate provocation by the defendant, [than] did defendant's conduct toward plaintiff.

The trial court also concluded as a matter of law that “[b]oth parties have subjected each other to indignities; but that plaintiff's indignities outweigh defendant's.”

On appeal, plaintiff contends the trial court erred by ordering him to pay alimony based on the finding that as husband and provider, he

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had a greater duty to recognize the difficulties between him and defendant, and that his failure to do so constituted indignities rendering defendant's condition intolerable and her life burdensome. He argues that both parties to a marriage have an equal duty to preserve the marriage, and that a heightened duty should not be placed on a male solely on the basis of his role of husband and provider.

It is commonly known that “[t]he moment the marriage relation comes into existence, certain rights and duties spring into being.” *Ritchie v. White*, 225 N.C. 450, 453, 35 S.E.2d 414, 415-16 (1945). At common law,

“[t]he husband, as head of the family, [was] charged with its support and maintenance, in return for which he [was] entitled to his wife’s services in all those domestic affairs which pertain to the comfort, care, and well-being of the family. Her labors [were] her contribution to the family support and care.”

Id. at 454, 35 S.E.2d at 416-17 (citation omitted). However, in *North Carolina Baptist Hospitals, Inc. v. Harris*, 319 N.C. 347, 353, 354 S.E.2d 471, 474 (1987), our Supreme Court held that the doctrine of necessities could be applied to a wife as well as a husband. The Court acknowledged that:

“These notions no longer accurately represent the society in which we live, and our laws have changed to reflect this fact. No longer must the husband be, nor is he in all instances the sole owner of the family wealth. No longer is the wife viewed as “little more than a chattel in the eyes of the law.” No longer in all cases is the husband the supporting and the wife the dependent spouse. No longer is the wife thought generally to be under the domination of her husband.”

Id. at 352-53, 354 S.E.2d at 474 (citation omitted). The Court also noted several developments in the laws of our jurisdiction indicating a trend toward “gender neutrality,” and pointed out that many statutory provisions formerly applied only to males were amended to apply to both genders, including N.C. Gen. Stat. § 14-322 (1981), which provided for criminal sanctions against both genders for non-support; N.C. Gen. Stat. § 50-16.1(4) (1984) (repealed 1995), which provided that either a husband or a wife could be deemed a supporting spouse; N.C. Gen. Stat. § 50-13.4(b) (1984), which provided that in the absence of exceptional circumstances, both mothers and fathers are primarily liable for child support; and, finally, the Equitable Distribution Act, N.C. Gen. Stat. §§ 50-20, -21 (1984 & Cum. Supp.

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1985), which treated “parties to a marriage as equal partners in a joint enterprise and appear[ed] . . . to be a clear break from the archaic notions reflected in earlier statutes.” *North Carolina Baptist Hospitals*, 319 N.C. at 352, 354 S.E.2d at 474. An additional development indicating “gender neutrality” in the family law area not mentioned by the Court in *North Carolina Baptist Hospitals, Inc.*, was the 1977 amendment to N.C. Gen. Stat. § 50-13.2(a), which abolished the maternal preference in child custody determinations. See 3 Robert E. Lee, *North Carolina Family Law* § 224, at 40-41 (4th ed. 1979).

The importance of the duty to preserve a marriage is evidenced by “our State’s public policies of endeavoring to maintain the marital state” *Bruce v. Bruce*, 79 N.C. App. 579, 583, 339 S.E.2d 855, 858, *disc. review denied*, 317 N.C. 701, 347 S.E.2d 36 (1986). We find nothing in our case law or in our General Statutes sanctioning the imposition of a heightened duty on one party to a marriage to preserve the marriage solely on the basis of gender. In fact, such an imposition would be inconsistent with the marked trend in this jurisdiction toward gender neutrality in the family law area and could violate Equal Protection principles. We therefore hold that both parties to a marriage have equal and corresponding duties to protect and preserve their marriage. The existence of a compelling circumstance such as mental or physical illness or infirmity could reduce the duty of the ill or infirm spouse to preserve and protect the marriage. However, we do not believe the failure to protect or preserve the marital relationship standing alone would constitute an indignity rendering a dependent spouse’s condition intolerable and life burdensome as required by N.C. Gen. Stat. § 50-16.2(7). See *Traywick v. Traywick*, 28 N.C. App. 291, 295, 221 S.E.2d 85, 88 (1976) (“The fundamental characteristic of indignities is that it must consist of a *course* of conduct or *continued* treatment which renders the condition of the injured party intolerable and life burdensome. The indignities must be *repeated and persisted in* over a period of time.’”) (quoting 1 Lee, *North Carolina Family Law*, § 82, at 311 (emphasis added)); 1 Suzanne Reynolds, *Lee’s North Carolina Family Law* § 6.11, at 569 (5th ed. 1993) (“Through indignities, the law makes a marital offense of a course of conduct that is humiliating and/or degrading to one’s spouse. Described in this way, indignities is a species of mental cruelty.”)

In the instant case, there are no compelling circumstances requiring the placement of a heightened duty on plaintiff to preserve his

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marriage to defendant. The trial court found that plaintiff's frequent absence from the home for extended periods of time increased the difficulties between the parties, and that defendant suffered additional hardships as a result of being a foreign-born wife. However, it is evident that both parties must have entered the marriage with knowledge that these sorts of difficulties would arise. Thus, the trial court improperly found that plaintiff had a heightened duty either to recognize the difficulties between him and defendant or to preserve the marriage, and also improperly found that his failure to fulfill this heightened duty constituted indignities toward defendant.

Reversed.

Chief Judge ARNOLD and Judge MARTIN, John C., concur.

UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF v. NANCY O. JOHNSON, EXECUTRIX OF THE ESTATE OF MELVIN MILLER JOHNSON AND TERESA TORGERSON, DEFENDANT AND NANCY O. JOHNSON, EXECUTRIX OF THE ESTATE OF MELVIN MILLER JOHNSON, PLAINTIFF v. TILLET MARK GREEN AND BILL LUCK SAND AND GRAVEL, INC., DEFENDANT

No. COA97-292

(Filed 3 February 1998)

1. Workers' Compensation § 85 (NCI4th)—wrongful death—employer's lien—settlement inadequate—lien eliminated—discretion of court

The trial court had discretion to eliminate the Department of Transportation's workers' compensation lien on settlement proceeds in a wrongful death action arising from the death of a DOT employee in an automobile accident with a third party. Although DOT advances several policy arguments that the superior court judge did not have discretion to deny the employer's lien, the plain language of N.C.G.S. § 97-10.2(j) authorizes such discretion.

2. Appeal and Error § 447 (NCI4th)—constitutional issue—raised at trial—not considered

The Court of Appeals did not consider the Department of Transportation's argument that N.C.G.S. § 97-10.2(j) was unconstitutional as applied in this case where the record does not affir-

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matively show that the question was raised and passed upon in the trial court.

3. Workers' Compensation § 85 (NCI4th)—wrongful death—employer's lien—settlement inadequate—lien eliminated—discretion of court—properly exercised

The trial court properly exercised its discretion pursuant to N.C.G.S. § 97-10.2(j) in denying an employer's lien to the Department of Transportation for workers' compensation benefits paid to the estate of a DOT employee killed in a car accident where the court's order was supported by its findings, conclusions, and applicable law. When a judge makes a ruling committed to the court's discretion, the law requires a reasoned choice; the reasoned choice based on the court's conclusions here would be to reduce the lien to nothing.

Appeal by North Carolina Department of Transportation from order entered 20 November 1996 by Judge Donald R. Huffman in Moore County Superior Court. Heard in the Court of Appeals 28 October 1997.

Attorney General Michael F. Easley, by Assistant Attorney General D. Sigsbee Miller, for appellant.

West & Smith, L.L.P., by Stanley W. West, for appellee.

WYNN, Judge.

When an employee receives workers' compensation from an employer for injuries and also receives a compensatory payment from a third party, to the extent that it provided benefits the employer has a lien on the third party's payment. However, where the third party payment is the result of a settlement, the legislature has left in the discretion of the superior court the amount of the lien. In the present case, after the decedent employee's estate reached a settlement, the superior court determined the employer's lien to be nothing. We affirm this decision, as the trial court could have reasonably concluded that such a result was equitable, because the funds available were insufficient to compensate for the decedent's death.

Melvin Miller Johnson, an employee of the Department of Transportation, died in an automobile accident when the personal vehicle that he drove while on State business was struck by a truck owned by Bill Luck Sand and Gravel, Inc., and driven by its employee,

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Tillet Mark Green. A passenger in Mr. Johnson's vehicle, his coworker Teresa Torgerson, was injured in the accident.

The Department of Transportation agreed to provide compensation under the North Carolina Workers' Compensation Act to Mr. Johnson's eligible family. The Industrial Commission approved the agreement, which provided that over a period of several years the Department of Transportation would make payments to Mr. Johnson's wife and child totaling \$148,955.

Mrs. Johnson qualified as executrix of her husband's estate and sued Mr. Green and the Bill Luck Company to recover wrongful death damages. The insurer of the driver and Bill Luck, United States Fidelity and Guaranty Company, thereafter filed an interpleader action and deposited the limit of its coverage, \$497,100, with the Moore County Clerk of Superior Court.

Some time after the accident, the Bill Luck Company declared bankruptcy. Ultimately, Mrs. Johnson settled with the driver and the Bill Luck Company for \$372,825, which represented 75% of the available insurance proceeds. Under another agreement, the passenger in Mr. Johnson's vehicle, Teresa Torgerson, received the remaining 25% of the available funds.

At the time of the settlement, the Department of Transportation had paid \$47,045.51 in workers' compensation. Following the settlement, under the authorization given by N.C. Gen. Stat. § 97-10.2(j) (1991), Mrs. Johnson moved the superior court to determine the amount that the Department of Transportation should recover on its lien on the \$372,825 settlement from the insurance proceeds.

After a hearing, the trial court concluded, *inter alia*, that "fair compensation for the injuries and damages received by Nancy O. Johnson, Executrix, far exceed all forms of assets available to compensate her including both liability coverage by [United States Fidelity and Guaranty Company] and workers' compensation benefits" and that "to allow the [Department of Transportation] to recover the workers' compensation lien for funds paid to or [to] be paid in this particular case would be inequitable under the particular facts and circumstances of this case." The court ordered that the Department of Transportation would recover nothing on its lien against the settlement funds. The Department of Transportation appeals.

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[1] The Department of Transportation first argues that the trial court erred by denying any recovery on its lien because N.C. Gen. Stat. § 97-10.2(j) does not grant to the trial court discretion to eliminate an employer's lien where the settlement amount exceeds the lien amount. We disagree.

In general, an employer has a lien upon any payment made by a third party to compensate for injury or death to the extent that the employer has provided workers' compensation benefits for the injury. N.C. Gen. Stat. § 97-10.2(f)(1)(c), (h) (1991). However, N.C. Gen. Stat. § 97-10.2(j) (1991) permits a party to have a superior court judge determine the subrogation amount that an employer is entitled to "in the event that a settlement has been agreed upon by the employee and the third party." That section further provides that "the judge shall determine, in his discretion, the amount, *if any*, of the employer's lien." (emphasis added).

Thus, while the Department of Transportation advances several policy arguments that the superior court judge did not have discretion to deny the employer's lien, the plain language of section 97-10.2(j) does authorize such discretion. Accordingly, the Department of Transportation's policy arguments are meritless; and we hold, as the statute plainly states, that the trial court did have discretion to eliminate the lien.

[2] The Department of Transportation next argues that N.C. Gen. Stat. § 97-10.2(j) is unconstitutional as applied to this case. However, our review of the record reveals that this contention was not raised before the trial court. An "appellate court will not decide a constitutional question which was not raised or considered in the trial court. The record must affirmatively show that the question was raised and passed upon in the trial court." *Midrex Corp. v. Lynch, Sec. of Revenue*, 50 N.C. App. 611, 618, 274 S.E.2d 853, 858, *appeal dismissed and disc. review denied*, 303 N.C. 181, 280 S.E.2d 453 (1981). Because the record does not reflect such a showing, we do not consider this argument.

[3] The Department of Transportation also contends that the trial court abused its discretion by totally eliminating the lien where the settlement was in an amount greater than the lien. However, as was discussed *supra*, under section 97-10.2(j) the trial court had discretion to determine the amount, *if any*, of the Department of Transportation's lien. When a judge makes a ruling committed to his or her discretion, the law requires that a reasoned choice be made.

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In this case, the trial court found that Mrs. Johnson, as the executrix of her husband's estate, would be entitled to damages for wrongful death. Mr. Johnson was 45 years old at the time of his death, had an income of over \$30,000 in the year proceeding his death, and was survived by his wife and two daughters. Furthermore, the trial court found as fact that the \$372,825 in insurance proceeds were the only funds available to compensate for Mr. Johnson's death. The trial court could have reasonably concluded the funds obtained from the settlement inadequately compensated Mr. Johnson's family for his death and that equity called for reduction of the lien. Based on these conclusions, a reasoned choice would be to reduce the lien to nothing. Accordingly, we hold that the trial court properly exercised its discretion.

Finally, the Department of Transportation argues that the trial court's order is not supported by its findings and conclusions or by applicable law. We disagree. Having reviewed the record, we find ample support for the trial court's conclusions of fact. Further, as discussed *supra*, we hold that those conclusions did support the trial court's exercise of discretion.

For the reasons given above, Superior Court Judge Donald R. Huffman's decision to deny the Department of Transportation any recovery on its lien in this case is,

Affirmed.

Judges EAGLES and MARTIN, Mark D., concur.

RUTH P. WICKER, PLAINTIFF v. KENNETH W. HOLLAND, GAIL M. HOLLAND AND GEORGE SIPSIS, DEFENDANTS v. KENNETH W. HOLLAND AND GAIL M. HOLLAND, THIRD-PARTY PLAINTIFFS v. BOLES PAVING INCORPORATED d/b/a SEDGEFIELD PAVING, THIRD-PARTY DEFENDANT

NO. COA97-264

(Filed 3 February 1998)

1. Pleadings § 378 (NCI4th)— motion to amend—new party—denied

In a negligence action resulting from damage to plaintiff's building, the trial court did not err by denying plaintiff's motion to amend her complaint to add a defendant. N.C.G.S. § 1A-1, Rule

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15(c) allows for the addition of new claims but does not allow the naming of a new party.

2. Appeal and Error § 418 (NCI4th)— brief—no reference to assignment of error—discrepancy between argument and assignment of error

Issues raised in plaintiff's brief were not considered where the argument was not the subject of an assignment of error and there was a discrepancy between the assignment of error and the argument.

Appeal by plaintiff from orders entered 5 December 1996 and 6 December 1996 by Judge Thomas W. Ross in Guilford County Superior Court. Heard in the Court of Appeals 28 October 1997.

Greeson, Griffin & Associates, by Harold F. Greeson and George Podgorny, Jr., for plaintiff-appellant.

Pinto, Coates & Kyre, L.L.P., by Paul D. Coates and William L. Hill, for defendants-appellees Kenneth W. Holland and Gail M. Holland.

Douglas E. Wright for defendant-appellee George Sipsis.

Teague, Rotenstreich & Stanaland, by Michael D. Holt and Ian J. Drake, for third-party defendant-appellee Boles Paving.

WYNN, Judge.

N.C. Gen. Stat. § 1A-1, Rule 15(c) provides:

A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

In this case, plaintiff Ruth P. Wicker argues that Rule 15 permits her to amend her pleading to designate third-party defendant Boles Paving, Inc. ("Boles") as a defendant to her original complaint so as to allow the relation back rule to apply. However, because our Supreme Court in *Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995) unequivocally observed that "[n]owhere in the rule is there a mention of parties" and held that the rule "does not apply to the naming of a new party-defendant to the action," we must affirm

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the trial court's refusal to allow her to amend her complaint to include Boles as a party.

In April of 1993, Kenneth W. Holland and his wife leased some land to George Sipsis. Ruth Wicker owned a building adjoining the property. Sipsis, intending to use the property for a parking lot, contracted with Boles to prepare the land for that use. While Boles performed the work for Sipsis, Wicker's property was damaged.

Wicker sued the Hollands and Sipsis on 2 June 1995 for negligently damaging her building. The complaint alleged that either the defendants' or an agent of the defendants' use of a soil compactor in the area around her building caused severe damage to her building. As a result, the business to which she had been leasing the building vacated the premises. The original complaint did not name Boles as a defendant.

Following the filing of their answers to Wicker's complaint, the Hollands filed a third-party complaint against Boles and Sipsis filed a cross-claim against Boles.

In September of 1996, the Hollands and Sipsis moved for summary judgment. Thereafter, on 16 September 1996, Wicker moved to amend her complaint to designate Boles as a defendant. The trial court denied her motion to amend and subsequently granted the Hollands's and Sipsis's motions for summary judgment. Wicker appeals from both actions.

I.

[1] Wicker first argues that the trial court committed reversible error by denying her motion to amend the complaint to add Boles as a party defendant. We disagree.

Wicker acknowledges that our Supreme Court has previously held that N. C. Gen. Stat. § 1A-1, Rule 15(c) "does not apply to the naming of a new party-defendant to [an] action." *Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995). The Supreme Court based this holding on the plain language of the rule, stating:

[n]owhere in the rule is there a mention of parties. It speaks of claims and allows the relation back of claims if the original claim gives notice of the transactions or occurrences to be proved pursuant to the amended pleading. When the amendment seeks to add a party-defendant or substitute a party-defendant to the suit, the required notice cannot occur. As a matter of course, the orig-

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inal claim cannot give notice of the transactions or occurrences to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed.

Id. See also Rogerson v. Fitzpatrick, 121 N.C. App. 728, 732, 468 S.E.2d 447, 450 (1996) (pointing out that under *Crossman* “Rule 15(c) applies only to allow the addition of new claims and not further defendants” and “*Crossman* prohibits the addition of new defendants under Rule 15(c).”)

Wicker argues that the present case is distinguishable from *Crossman* because Boles was designated as a third-party defendant and would suffer no prejudice by being designated as a party-defendant because it was on notice of the claim. This argument is irrelevant under *Crossman*’s analysis of the limited reach of Rule 15(c). Wicker sought to add a party, and such action is not authorized by the rule. Accordingly, we must find no error in the trial court’s denial of her motion to amend.

II.

Wicker next argues that the trial court erred by granting the Holland’s and Sipsis’s motions for summary judgment. We do not consider the merits of this contention.

[2] First, we note that the argument presented in her brief does not reference an assignment of error. Under N.C.R. App. P. 28(b)(5), “[i]mmediately following each question [presented] shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal.” Failure to comply with this rule subjects an appeal to dismissal. *See State v. Shelton*, 53 N.C. App. 632, 635, 281 S.E.2d 684, 688 (1981), *appeal dismissed and disc. review denied*, 305 N.C. 306, 290 S.E.2d 707 (1982).

More serious is a discrepancy between the assignment of error and the argument presented in her brief. Wicker assigned as error the following:

The court’s granting of defendants Kenneth W. Holland, Gail M. Holland and George Sipsis’ motions for summary judgment under [N.C.R. Civ. P. 56] on the grounds that as a matter of law, a genuine issue of material fact existed.

In her brief, Wicker did not present any argument that there was a genuine issue of material fact. Relying on *Waters v. Biesecker*, 309

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N.C. 165, 305 S.E.2d 539 (1983), and *Davis v. Summerfield*, 133 N.C. 325, 45 S.E. 654 (1903), she argued that based on the facts before the court the defendants should be liable both for the actions of Boles and for failing to warn her that they had contracted for the construction work.

The “scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule.” N.C.R. App. P. 10(a). Accordingly, we do not consider the issues raised in Wicker’s brief because they were not the subject of an assignment of error. Furthermore, because the issue that was addressed by the assignment of error was not raised in her brief, it is deemed abandoned. See N.C.R. App. P. 28(b)(5).

For the reasons given above, the orders of the trial court are

Affirmed.

Judges EAGLES and MARTIN, Mark D., concur.

EVELYN C. JACOBS, PLAINTIFF v. ROYAL INSURANCE COMPANY OF AMERICA AND
CALVERT INSURANCE COMPANY, DEFENDANTS

No. COA97-559

(Filed 3 February 1998)

**Pleadings § 107 (NCI4th)—Rule 12(b)(6) motion to dismiss—
evidence outside pleadings—improperly considered**

The trial court erroneously granted defendant Calvert Insurance Company’s motion to dismiss plaintiff’s amended complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) based on consideration of evidence outside the pleadings.

Appeal by defendant Royal Insurance Company of America from order entered 10 March 1997 by Judge George L. Wainwright, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 13 January 1998.

On 11 May 1993, plaintiff Evelyn C. Jacobs was injured when the automobile she was driving was struck by Alfredo J. Rocha. Rocha, though uninsured, had rented the car from Pass Rent-A-Car, a Florida

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corporation. Plaintiff's insurance company was the defendant-appellant, Royal Insurance Company of America ("Royal").

On 22 November 1994, plaintiff filed suit against Rocha. On 30 October 1995, a default judgment was entered against Rocha in the amount of \$30,000 plus interest and costs. On 4 April 1996, plaintiff filed a declaratory judgment action against Royal alleging that Royal was liable for the entire judgment under an uninsured motorist policy issued to plaintiff by Royal. On 15 August 1996, plaintiff filed a motion to add Calvert Insurance Company ("Calvert") because Calvert had issued a policy of liability insurance covering the vehicle in question "for claims in excess of \$100,000.00." On 3 October 1996 Plaintiff filed an amended complaint alleging that Calvert must provide the minimum amount of liability insurance as mandated by North Carolina's Fiscal Responsibility Act, G.S. 279.21, *et seq.*

On 20 December 1996, Calvert filed a motion to dismiss the amended complaint pursuant to Rule 12(b)(6). On 10 February 1997 the motion was granted and the complaint against Calvert dismissed. Shortly thereafter, plaintiff and Royal reached a settlement whereby Royal paid plaintiff the sum of \$25,000 in exchange for an assignment of the plaintiff's rights against Calvert. On 6 March 1997, Royal filed a motion for a supplemental order for determination under Rule 54(b) because the issues were now between Royal and Calvert as to who had responsibility for the minimum limits pursuant to the Financial Responsibility Act.

On 10 March 1997, the trial court issued an amended order dismissing Calvert and making the necessary findings pursuant to Rule 54(b). The trial court determined that "as a matter of law, an excess insurer does not 'drop down' and become liable for amounts below the threshold figure triggering liability under the excess insurance policy." Royal appeals.

Dean & Gibson, L.L.P., by Brien D. Stockman, for defendant-appellant Royal Insurance Company of America.

Ward and Smith, P.A., by J. Randall Hiner, for defendant-appellee Calvert Insurance Company.

EAGLES, Judge.

We first consider whether the trial court erred in dismissing the amended complaint on the grounds that Calvert Insurance Company

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is an excess insurer. Royal asserts that the trial court erred in deviating from the face of the pleadings by considering oral representations regarding the terms of Calvert's liability policy with respect to an alleged \$100,000 Self-Insured Retention Endorsement. Royal also argues that the motion to add Calvert as a necessary party, which alleged that Calvert insured the rental vehicle "for claims in excess of \$100,000.00," should not be considered because it was beyond the face of the complaint and amended complaint. Royal maintains that the trial court could not have made a correct conclusion of law regarding the meaning of the Calvert policy without examining the contents and language of the policy. Royal concludes that since no copy of the policy was entered into the record, the judge apparently relied upon counsel's oral representations as to the terms and conditions of that policy.

Calvert argues that the Court properly considered that Calvert was an excess insurer because the motion to add Calvert as a necessary party was a part of the pleadings. Calvert alternatively argues that if this Court should determine that the pleadings should be limited to the complaint, then the motion to add Calvert as a party should be considered as part of the amended complaint, because "the nexus between the two [documents] is so intimate that it was proper for the trial court to consider the two documents in tandem when ruling . . ." Finally, Calvert argues that if the trial court erroneously granted Calvert's Rule 12(b)(6) motion based upon the motion to add Calvert, then the trial court's ruling should be upheld as a Rule 12(c) motion for judgment on the pleadings.

On this record, we conclude that because the trial court considered evidence outside the pleadings, Calvert's motion to dismiss should not have been granted and is reversed. In ruling on a motion to dismiss, a court properly may consider only evidence contained in or asserted in the pleadings. *See American Angus Ass'n v. Sysco Corp.*, 865 F.Supp. 1174, 1175 (W.D.N.C. 1993); *State of Tenn. on Behalf of Tennessee Dept. of Health and Environment v. Environmental Management Com'n of State of N.C.*, 78 N.C. App. 763, 765, 338 S.E.2d 781, 782 (1986). The motion to add Calvert as a party was not part of the pleadings and the statement in the motion that Calvert was an excess insurer should not have been considered. *See W. Brian Howell, Shuford North Carolina Civil Practice and Procedure § 7-5 (4th Ed. 1992)* ("... a motion is not considered a pleading, as indicated by the delineation between Rule 7(a) regarding pleadings and Rule 7(b) regarding motions."). Accordingly, the

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trial court's order dismissing the amended complaint pursuant to Rule 12(b)(6) was erroneous and is reversed. Based on our disposition of this issue, we need not address the remaining issues raised on appeal.

Reversed and remanded.

Judges WYNN and WALKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS
(FILED 20 JANUARY 1998)

CALHOUN v. SARA LEE HOSIERY No. 97-15	Ind. Comm. (226121)	Affirmed
HARGETT v. HARGETT No. 97-402	Craven (95CVS1619)	Affirmed
MARVELS v. BILTMORE CO. No. 97-276	Ind. Comm. (071167)	Affirmed
PEZZELLA v. MORTLOCK No. 97-267	Cherokee (97CVS67)	Affirmed
SMITH v. WAKE MEDICAL CENTER No. 97-79	Wake (94CVS1722)	Affirmed
STATE v. HOWARD No. 96-1482	Wake (95CRS71589)	Reversed and Remanded
STATE v. SPRINGS No. 96-1508	Mecklenburg (94CRS74995) (94CRS74997) (94CRS74999) (94CRS75001)	No Error
T. L. HERRING & CO. v. BD. OF ADJUST. OF WILSON No. 97-419	Wilson (96CVS1158)	Reversed and Remanded
WALDEN v. BURKE COUNTY BD. OF EDUC. No. 97-366	Burke (96CVS851)	Affirmed
WINTERBERG v. BURNS AEROSPACE CORP. No. 97-399	Forsyth (94CVS6247)	Reversed and Remanded

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BOSEMAN v. STATE FARM INS. CO. No. 97-619	Edgecombe (97CVS0007)	Affirmed
CAULEY v. ELIZABETH CITY SCHOOLS No. 97-308	Ind. Comm. (110268)	Affirmed
DALTON v. DALTON No. 97-467	Iredell (94CVD873)	No Error

DINKINS v. JONES No. 97-365	Jackson (94SP48)	Affirmed
HAYES v. TYSON FOODS, INC. No. 96-1300	Ind. Comm. (304609)	Affirmed
HEARNE v. SHERMAN No. 97-104	Chatham (96CVS17)	Affirmed
HUFFMAN v. TAYLOR No. 96-1452	McDowell (96CVS413)	Affirmed
IN RE APPEAL OF EDWARD ROSE BLDG. CO. No. 97-103	Property Tax Commission (96PTC191)	Affirmed
JACKSON'S IGA KENANSVILLE v. FAISON No. 97-174	Duplin (95CVD773)	Affirmed
LIN v. LIN No. 97-339	Durham (90CVD04498)	Appeal Dismissed
NEMY v. JOHN CROSLAND CO. No. 97-465	Wake (95CVS3501)	Dismissed
PLYMOUTH v. GLEN RAVEN MILLS No. 97-341	Ind. Comm. (536162)	Affirmed
SMITH v. N.C. DEPT. OF LABOR No. 97-285	Wake (96CVS2614)	Appeal Dismissed
STATE v. ARMSTRONG No. 97-140	Robeson (93CRS942)	No error in defendant's conviction, remand for resentencing
STATE v. McCLAIN No. 97-207	New Hanover (95CRS29853) (95CRS29854) (95CRS31396)	No Error
STATE v. WATERS No. 97-212	Wake (95CRS99895) (95CRS99896)	Case No. 94CRS99895— Reversed Case No. 95CRS99896)— Remanded for resentencing.

DTH PUBLISHING CORP. v. UNC-CHAPEL HILL

[128 N.C. App. 534 (1998)]

DTH PUBLISHING CORPORATION, D/B/A *THE DAILY TAR HEEL*, PLAINTIFF V. THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL AND THE UNC-CH UNDERGRADUATE COURT, DEFENDANTS

No. COA97-305

(Filed 17 February 1998)

1. State § 10 (NCI4th)— UNC-CH Undergraduate Court—“public body”

The trial court did not err in its determination that the UNC-CH Undergraduate Court is a “public body” under N.C.G.S. § 143-318.10. The Undergraduate Court members are clearly appointed and confirmed by those who are authorized to do so under the laws of this State and pursuant to the policies and regulations of UNC-CH and UNC; additionally, the stipulated facts demonstrate that the Undergraduate Court qualifies as a “public body” pursuant to the remaining requirements of N.C.G.S. § 143-318.10.

2. State § 10 (NCI4th)— UNC-CH Undergraduate Court—closed session—Federal Education and Privacy Right Act

The trial court did not err by ruling that defendant UNC-CH Undergraduate Court, as a public body, was authorized to close its proceedings pursuant to N.C.G.S. § 143-318.11(a)(1) and 20 U.S.C. §1232g, the Family Educational and Privacy Rights Act (FEPRA). FEPRA clearly expresses the federal policy that student education records should not be widely disseminated to the public and makes student education records “privileged or confidential” for N.C.G.S. § 143-318.11(a)(1) purposes.

3. Records of Instruments, Documents, or Things § 1 (NCI4th)— UNC-CH Undergraduate Court—closed session—minutes withheld—Public Records Act

The records of a closed session of the UNC-CH Undergraduate Court may be withheld from public inspection pursuant to N.C.G.S. § 143-318.10(e) where a closed session of the Undergraduate Court was authorized under N.C.G.S. § 143-318.11. Although the Public Records Act provides that minutes of official meetings of a public body are public records under N.C.G.S. § 132-1 et seq., N.C.G.S. § 143-318.10(e) provides that minutes may be withheld so long as public inspection would frustrate the purpose of a closed session.

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4. Constitutional Law § 128 (NCI4th)— UNC-CH Undergraduate Court—closed session—no closed court violation—not a court

The closure of defendant UNC-CH's Undergraduate Court proceedings did not violate the open courts provision in Article I, § 18 of the North Carolina Constitution. The Undergraduate Court is not a "court" under the open courts provision; it not only cannot, but, in fact, does not, wield the judicial power of the State in its regulation of student conduct. Its powers are not derivative of our judiciary system nor are they limited by the safeguards protecting a citizen in the court system.

5. Constitutional Law § 128 (NCI4th)— UNC-CH Undergraduate Court—closed session—no open courts violation

Even if the UNC-CH Undergraduate Court were properly categorized as a court, the open courts provision of the North Carolina Constitution does not require that its proceedings be open to the public because that provision has its roots in the historic practice of open criminal and civil trials and there is no record evidence that UNC student disciplinary proceedings have been historically open to the public. As with the pre-1973 civil commitment process described in *In re Belk*, 107 N.C. App. 448, the proceedings of the Undergraduate Court are not governed by the same procedures as the formal judicial hearings conducted by courts of the General Court of Justice.

6. Constitutional Law § 128 (NCI4th)— UNC-Chapel Hill Undergraduate Court—closed session—First Amendment—no violation

The First Amendment to the United States Constitution does not give the public a presumptive right of access to UNC-CH Undergraduate Court proceedings. The United States Supreme Court has not yet decided whether the public's presumptive right to attend certain criminal proceedings extends to civil proceedings, the record evidence does not show that UNC-CH disciplinary proceedings have been historically open to the press and general public, and, on the record presented, public access would not play a significant positive role in the functioning of these proceedings.

Appeal by defendants and by plaintiff from judgment entered 12 December 1996 by Judge F. Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 23 October 1997.

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Everett, Gaskins, Hancock & Stevens, by Hugh Stevens and C. Amanda Martin, for plaintiff.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas J. Ziko, for defendants.

McGEE, Judge.

This appeal raises the issue of whether a University of North Carolina at Chapel Hill (UNC-CH) Undergraduate Court may hold student disciplinary proceedings in closed session. The parties have stipulated to the facts which are summarized as follows. On or about 13 February 1996, approximately 1500 copies of the *Carolina Review*, a UNC-CH student magazine, were removed from the racks used for distribution of the magazine. On 16 April 1996, the Undergraduate Court commenced disciplinary proceedings against two students regarding this incident. The editor of *The Daily Tar Heel*, a daily newspaper which serves the UNC-CH community, attempted to attend the Undergraduate Court proceedings but was informed by a UNC-CH Judicial Programs Officer that Undergraduate Court hearings were required to be closed. On 17 April 1996 DTH Publishing Corporation (DTH), d/b/a *The Daily Tar Heel*, obtained an ex parte temporary restraining order in Orange County Superior Court from Judge Jack A. Thompson, and a hearing was set to determine whether the restraining order should remain in effect. Following the 18 April 1996 hearing, Judge Thompson, in an order entered 19 April 1996, refused to continue the temporary restraining order.

On 18 April 1996, DTH filed this action seeking injunctive relief and alleging, *inter alia*, that: (1) defendants violated N.C. Gen. Stat. § 143-318.9 *et. seq.* (the Open Meetings Law) by refusing to permit public access to Undergraduate Court proceedings; (2) recordings of the Undergraduate Court proceedings were public records under N.C. Gen. Stat. § 132-1 and must be available for public inspection and copying; (3) defendants violated Article I, § 18 of the North Carolina Constitution (open courts provision) by closing the Undergraduate Court proceedings to the public; and (4) UNC-CH's refusal to permit plaintiff access to the Undergraduate Court proceedings violated the First Amendment of the United States Constitution. Defendants admitted they had denied plaintiff access to the Undergraduate Court proceedings but denied that plaintiff was entitled to the relief sought. The matter was heard without a jury upon stipulated facts at the 2 December 1996 Civil Session of Orange

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County Superior Court, Judge F. Gordon Battle presiding. On 12 December 1996, the trial court entered judgment in which it adopted the stipulated facts and denied plaintiff the relief sought, ruling that: (1) the Undergraduate Court is a public body subject to the Open Meetings Law; (2) the Undergraduate Court has the right under N.C. Gen. Stat. § 143-318.11(a)(1) and 20 U.S.C. § 1232g to conduct hearings in closed session; (3) plaintiff has no right to inspect or copy recordings of closed sessions of the Undergraduate Court; (4) the Undergraduate Court is not a court subject to the open courts provision of the state constitution; and (5) plaintiff is not entitled to relief under the First Amendment. Both defendants and plaintiff appeal.

Defendants' Appeal

[1] Defendants argue that the trial court erred by ruling that the Undergraduate Court is a “public body” subject to the Open Meetings Law. We disagree. The Open Meetings Law provides in pertinent part:

(a) Except as provided in G.S. 143-318.11, G.S. 143-318.14A, G.S. 143-318.15, and G.S. 143-318.18, each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting.

(b) As used in this Article, “public body” means any elected or appointed authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, constituent institutions of The University of North Carolina, or other political subdivisions or public corporations in the State that (i) is composed of two or more members and (ii) exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function.

N.C. Gen. Stat. § 143-318.10 (1996). Defendants contend the Undergraduate Court is not an “elected or appointed authority, board, commission, committee, council, or other body . . . of one or more . . . constituent institutions of the University of North Carolina” because the Undergraduate Court members are not directly appointed by the UNC-CH Board of Trustees. We hold that defendants’ narrow construction of “public body” is unsupported by the statutory language.

The parties have stipulated to the organization of the Undergraduate Court as follows. The members of the Undergraduate Court are appointed by the Student Body President and confirmed by the Student Congress in accordance with policies adopted by the

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UNC-CH Chancellor pursuant to the authority delegated to the Chancellor by the UNC Board of Governors. The Chancellor has charged and authorized “the student courts, including the Undergraduate Court . . . with adjudication of allegations of violation of the Instrument of Student Judicial Governance, which incorporates the Code of Student Conduct.” The student court members are certified as qualified to serve by the Undergraduate Court Chair and the Vice Chancellor for Student Affairs. All sanctions resulting from the Undergraduate Court’s verdict are administered by the Vice Chancellor for Student Affairs whose authority on this matter has been delegated to the Judicial Programs Officer. A student who is found guilty may appeal to the University Hearings Board and may appeal further to the Chancellor if the student claims a violation of basic rights. An appeal from the Chancellor’s decision can be taken to the UNC-CH Board of Trustees.

In 1994, the General Assembly amended the N.C.G.S. § 143-318.10 definition of “public body” adding the phrase “elected or appointed” and deleting previous requirements that the public body be established in certain enumerated ways. *See* 1994 N.C. Sess. Laws ch. 570, § 1; *see also* David M. Lawrence, *1994 Changes to the Open Meetings Law*, Local Government Law Bulletin, September 1994, at 1. The current N.C.G.S. § 143-318.10 does not delineate who or what entity must do the appointing for a body to qualify as “appointed.” Black’s Law Dictionary defines the terms “appoint” and “appointment” as follows, in pertinent part:

Appoint. To designate, choose, select, assign, ordain, prescribe, constitute, or nominate. To allot or set apart. To assign authority to a particular use, task, position, or office.

Term is used where exclusive power and authority is given to one person, officer, or body to name persons to hold certain offices.

Appointment. The designation of a person, by the person or persons having authority therefor, to discharge the duties of some office or trust.

...

Office or public function. The selection or designation of a person, by the person or persons having authority therefor, to fill an office or public function and discharge the duties of the same. The term “appointment” is to be distinguished from “election.”

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Black's Law Dictionary 99 (6th ed. 1990). One of the distinguishing characteristics of these definitions is that the person or body doing the appointing must be one *authorized* to do so. Here, the parties' stipulations demonstrate that the Student Body President and the Student Congress derive their authority to appoint and confirm Undergraduate Court members from the Chancellor, who in turn derives his authority on this matter from the UNC-CH Board of Trustees. The Chancellor and the UNC-CH Board of Trustees derive their authority from the Board of Governors of the University of North Carolina (UNC) which, in turn, derives its authority from N.C. Gen. Stat. § 116-11(2) (1994) and Article IX, Section 8 of our North Carolina Constitution. Thus, the Undergraduate Court members are clearly appointed and confirmed by those who are authorized to do so under the laws of this State and pursuant to the policies and regulations of UNC-CH and UNC.

In addition, the stipulated facts demonstrate that the Undergraduate Court qualifies as a "public body" pursuant to the remaining N.C.G.S. § 143-318.10 requirements. Since the Undergraduate Court has a chairperson, vice chairs, at least thirty members, and hears evidence in the presence of four members led by the chair or a vice-chair, it clearly "is composed of two or more members" as required by N.C.G.S. § 143-318.10. The stipulated facts also demonstrate that the Undergraduate Court is authorized to exercise an administrative or advisory function pursuant to N.C.G.S. § 143-318.10 when it holds hearings, issues subpoenas, renders verdicts, and recommends sanctions pursuant to the power granted to it by the University. In sum, we hold that the UNC-CH Undergraduate Court is a "public body" under N.C.G.S. § 143-318.10 as the trial court correctly determined.

Plaintiff's Appeal

[2] Plaintiff argues that the trial court erred by ruling that the Undergraduate Court, as a public body, was authorized pursuant to N.C. Gen. Stat. § 143-318.11(a)(1) and 20 U.S.C. § 1232g to close its proceedings. N.C.G.S. § 143-318.11(a)(1) as amended in 1994 provides:

(a) Permitted Purposes.—It is the policy of this State that closed sessions shall be held only when required to permit a public body to act in the public interest as permitted in this section. A public body may hold a closed session and exclude the public only when a closed session is required:

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(1) To prevent the disclosure of information that is *privileged or confidential pursuant to the law of this State or of the United States*, or not considered a public record within the meaning of Chapter 132 of the General Statutes.

(Emphasis added).

Plaintiff contends the trial court erred by concluding that the Family Educational and Privacy Rights Act (FERPA), codified at 20 U.S.C. § 1232g, renders the student information divulged in Undergraduate Court proceedings “privileged or confidential” under N.C.G.S. § 143-318.11(a)(1). We disagree. FERPA withholds federal funds from any educational agency or institution which has a policy or practice of releasing educational records, or personally identifiable information contained in educational records, to anyone other than certain enumerated persons and entities without the consent of the student’s parents or the student, if the student is eighteen years or older, or is attending a postsecondary educational institution. *See* 20 U.S.C. § 1232g(b), (d)(1997).

Although FERPA does not *require* UNC to do anything, but instead operates by withholding funds, we hold FERPA does make student education records “privileged or confidential” for N.C.G.S. § 143-318.11(a)(1) purposes. *See Student Bar Association v. Byrd*, 293 N.C. 594, 598-99, 239 S.E.2d 415, 419 (1977). Based on its review of FERPA legislative history, a federal district court has observed, “FERPA was adopted to address systematic . . . violations of students’ privacy and confidentiality rights through unauthorized releases of sensitive educational records.” *Smith v. Duquesne University*, 612 F. Supp. 72, 80 (1985), *aff’d*, 787 F.2d 583 (1986); *see also Bauer v. Kincaid*, 759 F. Supp. 575, 590-91 (1991). FERPA does not specifically employ the terms “privileged” and “confidential” but it clearly expresses the federal policy that student education records should not be widely disseminated to the public and, except in certain enumerated circumstances, should not be released without proper consent. *See* 20 U.S.C. § 1232g(b), (d) (1997).

Plaintiff argues, however, that the United States Supreme Court’s recent denial of certiorari in an Ohio Supreme Court case, *State ex Rel. The Miami Student v. Miami University*, 680 N.E.2d 956 (1997), *cert. denied*, 66 U.S.L.W. 3298 (U.S. Ohio, Dec. 08, 1997) (No. 97-606), should influence our opinion in the case before us. A review of numerous United States Supreme Court opinions shows that a denial of writ of certiorari by the Supreme Court “imports no expression

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upon the merits of the case.” *United States v. Carver*, 260 U.S. 482, 490, 67 L. Ed. 361, 364 (1923). The Supreme Court’s review on a writ of certiorari is subject to the Court’s judicial discretion and does “not establish the law of the case.” *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 364, 34 L. Ed. 2d 577, 581 n.1 (1973). Moreover, the facts in this matter are distinguishable from the Ohio case. The Ohio Supreme Court held that records of student disciplinary proceedings with the names of the students deleted were not protected by FERPA. *Miami University*, 680 N.E.2d at 172. The school was required to reveal only “the general location of the incident, the age and sex of the student . . . the nature of the offense, and the type of disciplinary penalty imposed.” *Id.* at 959. The Court also permitted Miami University to omit the “exact date and time of the alleged incident . . . since this constitutes other information that may lead to the identity of the student.” *Id.* While the Ohio Supreme Court ordered the release of essentially statistical information regarding disciplinary proceedings, it did so only to the extent that it did not risk jeopardizing the privacy of an individual student by requiring the disclosure of the results from one specific disciplinary hearing. We therefore do not follow the Ohio Supreme Court’s opinion in this case as it is undisputed that the identity of the student would not be protected if the meeting was open.

FERPA defines “education records” as “those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 20 U.S.C. § 1232g(a)(4)(A); see also 34 C.F.R. § 99.3 (setting forth United States Department of Education definition of “education records” under FERPA). The statute also lists certain materials which are not considered “education records.” See 20 U.S.C. § 1232g(a)(4)(B). However, there is no express exception for information divulged in student disciplinary proceedings.

Here, the parties’ stipulations show that “[i]t is impossible to hold a student disciplinary hearing without divulging student records as defined under FERPA or personally identifiable information contained therein.” Other stipulations also show that the records so divulged contain information directly related to students and are maintained by UNC-CH or by persons acting for UNC-CH. Given the breadth of FERPA’s definition of “education records” and based on the stipulated facts, the student records at issue in this appeal are protected as “education records” under FERPA and are “privileged or

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confidential pursuant to the law . . . of the United States" under N.C.G.S. § 143-318.11(a)(1). Thus, the trial court correctly ruled that the Undergraduate Court was entitled to hold a closed session to prevent the disclosure of education records protected by FERPA.

[3] Our resolution of this issue necessarily disposes of plaintiff's contention that the recordings of the Undergraduate Court proceeding must be made available under the Public Records Law, codified at N.C. Gen. Stat. § 132-1 *et. seq.* The minutes (including recordings) of official meetings of a public body are "public records" under N.C.G.S. § 132-1 *et. seq.* N.C.G.S. § 143-318.10(e)(1996). However, N.C.G.S. § 143-318.10(e) further provides that "minutes . . . of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session." N.C.G.S. § 143-318.10(e). Since we have held that the closed session of the Undergraduate Court was authorized under N.C.G.S. § 143-318.11, we also hold that the recordings of the closed session may be withheld from public inspection pursuant to N.C.G.S. § 143-318.10(e).

[4] Plaintiff next contends that our state constitution open courts provision requires that Undergraduate Court proceedings be open to the public. Our state constitution provides: "Sec. 18. Courts shall be open. All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. In a civil action filed by a doctor against a hospital challenging suspension of his medical staff privileges, this Court recently held unconstitutional various trial court orders that closed pre-trial proceedings and sealed court records in which medical peer review materials were introduced or discussed. *Virmani v. Presbyterian Health Services Corp.*, 127 N.C. App. 629, 493 S.E.2d 310 (1997). We held that the open courts provision creates a strong presumption that civil court proceedings be kept open to the public and that "the occasion for closing presumptively open proceedings and sealing court records should be exceedingly rare." *Id.* at 645, 493 S.E.2d at 320.

Defendant argues, and the trial court ruled, that the Undergraduate Court is not a "court" under the open courts provision. We agree. In *Virmani*, the proceedings at issue were those of the Mecklenburg County Superior Court, one of the several superior courts of this State which constitute the Superior Court Division of

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the General Court of Justice as established by the North Carolina Constitution and Chapter 7A of the General Statutes. *See Virmani*, 127 N.C. App. at 632, 493 S.E.2d at 313; N.C. Const. art. IV, § 2; N.C. Gen. Stat. § 7A-40 (1995). At its heart, the open courts provision serves to protect the institutional integrity of our state courts by constitutionally guaranteeing that justice is “administered openly in public view.” *See Virmani*, 127 N.C. App. at 645, 493 S.E.2d at 320. Similarly, our Supreme Court, citing the open courts provision, previously held that willful misconduct and conduct prejudicial to the administration of justice occurred when a trial judge, *inter alia*, improperly removed a criminal proceeding from the public domain. *For e.g., In re Nowell*, 293 N.C. 235, 249-52, 237 S.E.2d 246, 255-57 (1977); *In re Edens*, 290 N.C. 299, 306-07, 226 S.E.2d 5, 9-10 (1976); *see also In re Stuhl*, 292 N.C. 379, 389-90, 233 S.E.2d 562, 568 (1977) (holding similarly in part because the judge “improperly removed the disposition of cases from public view in open court and transacted the court’s business in secrecy”).

This constitutional imperative to guarantee the integrity of our state courts is *not* at stake in regard to the Undergraduate Court proceedings because the Undergraduate Court not only *cannot* but, in fact, *does not* wield the judicial power of the State in its regulation of student conduct. Our state constitution vests the judicial power of the State as follows:

Section 1. Judicial power.

The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

N.C. Const. art. IV, § 1. Our state constitution authorizes the General Assembly to vest judicial power in administrative agencies as follows:

The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice.

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N.C. Const. art. IV, § 3. The General Assembly has vested judicial power in the General Court of Justice pursuant to N.C. Gen. Stat. § 7A-3 (1995) which provides, in pertinent part:

Except for the judicial power vested in the court for the trial of impeachments, and except for such judicial power as may from time to time be vested by the General Assembly in administrative agencies, the judicial power of the State is vested exclusively in the General Court of Justice.

The Undergraduate Court is clearly not a “court” within the General Court of Justice as it is not part of any of the three divisions of the General Court of Justice as established by our state constitution and by the General Assembly. *See* N.C. Const. art. IV, § 2 and N.C. Gen. Stat. § 7A-4 (establishing the Appellate, Superior Court, and District Court Divisions of the General Court of Justice); N.C. Const. art. IV, §§ 5 - 10 and Chapter 7A, Subchapters I, II, III, and IV of the General Statutes (establishing and describing the components of the three divisions of the General Court of Justice). Although the North Carolina Constitution directs the General Assembly to establish the University of North Carolina, *see* N.C. Const. art. IX, § 8, the Constitution does not vest UNC, UNC-CH, or the UNC-CH Undergraduate Court with the judicial power of the State. In addition, we have not found any statute or cases providing that the UNC-CH Undergraduate Court, either directly or indirectly through UNC or UNC-CH, is an administrative agency vested with state judicial power by the General Assembly pursuant to N.C. Const. art. IV, §§ 1 & 3 and N.C.G.S. § 7A-3. For example, we have found no statute vesting power in UNC, UNC-CH, or in the UNC-CH Undergraduate Court analogous to that vested in the Office of Administrative Hearings (OAH) by N.C. Gen. Stat. § 7A-750 in accordance with N.C. Const. art. IV, § 3. *See* N.C.G.S. § 7A-750 (1995).

Furthermore, the UNC-CH Undergraduate Court *functionally* does not wield the power of the State as does a court in the General Court of Justice. Although the Undergraduate Court may impose some sanctions, all sanctions are administered by the Vice Chancellor for Student Affairs. The sanction of expulsion may be recommended by the Undergraduate Court, but may only be imposed or rescinded by the Chancellor. These sanctions are limited in scope in that they only regulate students’ relationship with the University and do not have any dispositive impact on students’ legal rights in the larger community. The Undergraduate Court’s limited power to impose pun-

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ishment contrasts sharply with the much broader enforcement powers exercised by a judge in the General Courts of Justice or by an administrative law judge. In addition, the UNC-CH Instrument of Student Governance explicitly differentiates University regulation of student conduct for the preservation of University interests from the civil and criminal law enforcement provided by state courts in the larger community to protect broader community and state interests.

Procedurally, the Undergraduate Court also differs markedly from a court in the General Court of Justice. The UNC-CH Chancellor has voluntarily adopted certain policies and procedures governing student disciplinary hearings in the Instrument of Student Governance. To some extent, these voluntarily adopted procedures resemble some of the procedures used in the courts of our General Court of Justice. However, there are important differences. For example, although the UNC-CH Undergraduate Court employs some evidentiary procedures similar to those in the North Carolina Rules of Evidence, the Instrument of Student Governance does not require or suggest that the Rules of Evidence be applied. In addition, although a student has a right to a student “defense counsel,” the Undergraduate Court procedures explicitly prohibit use of a licensed attorney as an investigator or as a defense counsel or as a support person present during the proceeding. Since the UNC-CH Undergraduate Court cannot and does not wield the judicial power of the State in its regulation of student conduct, we hold that the UNC-CH Undergraduate Court is not a “court” within the meaning of our state constitution open courts provision.

We acknowledge the importance of the role of a student disciplinary body in the adjudication of alleged violations of university codes of student conduct. However, this body’s powers are not derivative of our judiciary system nor are they limited by the necessary safeguards protecting a citizen in our court system; the Undergraduate Court can best serve in determining and punishing academic misconduct, not in serving as a substitute for our court system in non-academic matters.

[5] Even if the Undergraduate Court were properly categorized as a “court,” the open courts provision does not require the Undergraduate Court proceedings to be open to the public. Our state constitution open courts provision has roots in the historic practice of having open criminal and civil trials. *See Virmani*, 127 N.C. App. at 637-46, 493 S.E.2d at 315-21; *see also Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15, 61 L. Ed. 2d 608, 625 n.15 (1979) (discussing com-

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mon law practice of public criminal and civil trials). Here, there is no record evidence that UNC student disciplinary proceedings, including UNC-CH Undergraduate Court proceedings, have been historically open to the public as have traditional civil and criminal trials. This Court has held that the open courts provision “does not create a constitutional right [of] the press and public to attend civil commitment proceedings.” *See In re Belk*, 107 N.C. App. 448, 453, 420 S.E.2d 682, 685, *appeal dismissed and disc. review denied*, 333 N.C. 168, 424 S.E.2d 905 (1992). The *Belk* Court reached this holding in part because, prior to 1973, the civil commitment process, unlike traditional civil trials, did not require formal judicial hearings. *Belk*, 107 N.C. App. at 452, 420 S.E.2d at 684. Similarly, the proceedings of the Undergraduate Court, like the pre-1973 civil commitment process described in *Belk*, are not governed by the same procedures as the formal judicial hearings conducted by courts of our General Court of Justice. For these reasons, we hold UNC-CH’s closure of the Undergraduate Court proceedings to the public did not violate Article I, § 18 of the North Carolina Constitution.

[6] Plaintiff finally contends that the closure of the Undergraduate Court proceedings violated the First Amendment of the United States Constitution. We disagree. The United States Supreme Court has held that the First Amendment provides the public with a presumptive right to attend certain criminal proceedings but the Court has not yet decided whether this right extends to civil proceedings. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6-13, 92 L. Ed. 2d 1, 9-13 (1986) (*Press-Enterprise II*); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-10, 78 L. Ed. 2d 629, 635-38 (1984) (*Press-Enterprise I*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-07, 73 L. Ed. 2d 248, 255-57 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81, 65 L. Ed. 2d 973, 991-93 (1980) (plurality opinion). We have also not found any cases in which either the United States Supreme Court or a North Carolina appellate court has held that state university student court disciplinary proceedings, like those at issue here, are presumptively open to the public under the First Amendment.

In deciding whether the public had a First Amendment right to attend a state court criminal preliminary hearing, the United States Supreme Court applied the tests of experience and logic. *See Press-Enterprise II*, 478 U.S. at 8-13, 92 L. Ed. 2d at 9-13. In applying the experience test, we must assess “whether the place and process have historically been open to the press and general public.” *See Press-*

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Enterprise II, 478 U.S. at 8, 92 L. Ed. 2d at 10. Application of the logic test requires our evaluation of “whether public access plays a significant positive role in the functioning of the particular process in question.” *See id.*

As discussed above, the record evidence does not show that UNC-CH student disciplinary proceedings have been historically open to the press and the general public. In addition, we are not persuaded that public access to the Undergraduate Court proceedings, on the record presented, would play a significant positive role in the functioning of these proceedings. We hold the First Amendment does not give the public a presumptive right of access to UNC-CH Undergraduate Court proceedings.

We affirm the judgment of the trial court.

Affirmed.

Judges LEWIS and MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. RONNIE THOMPSON

No. COA97-236

(Filed 17 February 1998)

1. Appeal and Error § 418 (NCI4th)—constitutional claim—failure to argue in brief—waiver

Defendant waived any consideration of a double jeopardy claim under the North Carolina Constitution where defendant's brief cited the district court's conclusion that both the federal and state constitutions provide protection from double jeopardy but made no argument regarding the North Carolina Constitution.

2. Appeal and Error § 77 (NCI4th)—order reinstating charges—interlocutory appeal—refusal of certification

Trial judges would, in the exercise of their discretion, be well advised to refuse to certify cases pursuant to N.C.G.S. § 15A-1432(d), which permits an interlocutory appeal of a superior court's reversal of a district court's dismissal of criminal charges if defendant or his attorney certifies that the appeal is not taken for delay and the judge finds the cause is appropriately justiciable in the appellate division as an interlocutory matter; instead, trial judges should proceed to

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judgment on the pending criminal charges so that defendants will be required to appeal all relevant issues in the case.

3. Arrest and Bail § 143 (NCI4th)— domestic violence—detention without bond—not double jeopardy

The statute permitting pretrial detention without bond for up to forty-eight hours for crimes of domestic violence, N.C.G.S. § 15A-534.1, is regulatory, not punitive in nature, and therefore does not constitute punishment for purposes of double jeopardy.

4. Appeal and Error § 418 (NCI4th)— constitutionality of statute as applied—waiver of challenge

Pursuant to N.C. R. App. P. 28(b)(5), defendant waived any challenge to the constitutionality of a statute as applied to him where defendant's assignments of error with respect to these arguments attacked only the facial validity of the statute and not the constitutionality of the statute as applied to defendant.

5. Arrest and Bail § 143 (NCI4th)— domestic violence—detention without bond—substantive due process

Pretrial detention of defendant for alleged domestic violence without bond for up to 48 hours as authorized by N.C.G.S. § 15A-534.1 did not violate defendant's substantive due process rights. U.S. Const. amend. V.

6. Arrest and Bail § 143—domestic violence—detention without bond—procedural due process

N.C.G.S. § 15A-534.1 did not violate defendant's procedural due process rights where the statute provides that a defendant arrested for domestic violence shall receive a hearing, have pretrial release conditions determined within 48 hours of arrest, and the officer determining pretrial release conditions must be a judge.

Appeal by defendant from order entered 26 April 1996 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 5 January 1998.

Attorney General Michael F. Easley, by Associate Attorney General Teresa L. Harris, for the State.

Assistant Public Defender Russell J. Hollers, III, for defendant appellant.

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SMITH, Judge.

On 28 October 1995, defendant was arrested on charges of assault inflicting serious injury, assault on a female, and second degree trespass in violation of N.C. Gen. Stat. §§ 14-33(b)(1), (2) (1993) (effective 1 January 1995) (repealed 1 December 1995) and 14-159.13 (1993) (amended effective 1 January 1995), respectively. The charges arose out of alleged assaults by defendant on two women, one of whom claimed to be a former domestic partner of defendant, on 20 October 1995. After his arrest, defendant was taken before a magistrate but was denied pretrial release on all charges. Pursuant to N.C. Gen. Stat. § 15A-534.1 (1997), which sets forth the conditions of bail and pretrial release for crimes of domestic violence, the magistrate ordered that defendant be brought before a judge or magistrate at 3:45 p.m. on 30 October 1995. On 30 October 1995, defendant was taken before a district court judge and ordered released upon posting a \$5,000.00 secured bond. Defendant was released that day after posting bond.

On 11 December 1995, defendant's case was called for trial in district court. Defendant entered pleas of not guilty to all charges and also moved to dismiss the charges pursuant to N.C. Gen. Stat. § 15A-954(5) (1997) arguing that, since he had been held for nearly 48 hours without bond, further prosecution would violate the prohibition against double jeopardy. After a hearing, the district court, citing *United States v. Halper*, 490 U.S. 435, 448, 104 L. Ed. 2d 487, 502 (1989), disavowed by *Hudson v. United States*, 522 U.S. —, — L. Ed. 2d — (1997), concluded that denial of pretrial release conditions for defendant amounted to punishment on the pending charges and that further prosecution would subject defendant to multiple punishments for the same offense in violation of U.S. Const. amend. V and N.C. Const. art. I, § 19. The district court then dismissed the charges against defendant.

The State appealed to superior court pursuant to N.C. Gen. Stat. § 15A-1432(a)(1) (1997). The superior court found that N.C. Gen. Stat. § 15A-534.1 was regulatory, rather than punitive, in nature and concluded the statute did not violate the Double Jeopardy Clauses of either the federal or state constitutions. The court ordered the charges against defendant reinstated and remanded the case to district court for trial. Defendant thereafter filed a notice of appeal to this Court.

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[1] On appeal, defendant contends the superior court erred by concluding that N.C. Gen. Stat. § 15A-534.1 does not violate the Double Jeopardy Clauses in U.S. Const. amend. V and N.C. Const. art. I, § 19. He argues that his detention without bond for nearly 48 hours constituted punishment and that further prosecution for the charges would subject him to multiple punishments for the same offenses. While in his brief defendant cites the district court's conclusion that both the federal and state constitutions provide protection from double jeopardy, defendant makes no argument regarding the North Carolina Constitution. Thus, defendant has waived any consideration of a double jeopardy violation under the North Carolina Constitution. *See* N.C.R. App. P. 28(b)(5) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.")

[2] We first observe that defendant appealed the superior court's order reinstating the charges against him pursuant to N.C. Gen. Stat. § 15A-1432(d), which permits a defendant to pursue an interlocutory appeal of a superior court's reversal of a district court's dismissal of criminal charges if "the defendant, or his attorney, certifies to the superior court judge who entered the order that the appeal is not taken for the purpose of delay and if the judge finds the cause is appropriately justiciable in the appellate division as an interlocutory matter." While the issue is not before us, we entertain some doubt as to the constitutionality of this statute. *See* N.C. Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."); N.C. Const. art. IV, § 13(2) ("The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division."). However, because the issue is not presented, we will assume no constitutional problems exist and address the merits of defendant's appeal since his attorney certified that the appeal was not taken for the purpose of delay and the superior court found the cause appropriately justiciable in the appellate division as an interlocutory matter. We note however that the appeal would not be appropriately justiciable in the appellate division except for N.C. Gen. Stat. § 15A-1432(d). Thus, the phrase "appropriately justiciable" in the statute is meaningless. We believe that trial judges would, in the exercise of their discretion, be well advised to refuse to certify cases pursuant to this statute. Instead, for the sake of judicial efficiency, trial judges should proceed to judgment on the pending crim-

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inal charges so that defendants will be required to appeal all relevant issues at the same time.

[3] N.C. Gen. Stat. § 15A-533(b) (1997) states that a defendant charged with a noncapital offense must have conditions of pretrial release set in accordance with N.C. Gen. Stat. § 15A-534 (1997), which delineates the procedure for determining conditions of pretrial release. N.C. Gen. Stat. § 15A-534.1(a) provides, in pertinent part:

(a) In all cases in which the defendant is charged with assault on or communicating a threat to a spouse or former spouse or a person with whom the defendant lives or has lived as if married, with domestic criminal trespass, or with violation of an order entered pursuant to Chapter 50B, Domestic Violence, of the General Statutes, the judicial official who determines the conditions of pretrial release shall be a judge, and the following provisions shall apply in addition to the provisions of G.S. 15A-534:

(1) Upon a determination by the judge that the immediate release of the defendant will pose a danger of injury to the alleged victim or to any other person or is likely to result in intimidation of the alleged victim and upon a determination that the execution of an appearance bond as required by G.S. 15A-534 will not reasonably assure that such injury or intimidation will not occur, a judge may retain the defendant in custody for a reasonable period of time while determining the conditions of pretrial release.

(2) A judge may impose the following conditions on pretrial release:

- a. That the defendant stay away from the home, school, business or place of employment of the alleged victim;
- b. That the defendant refrain from assaulting, beating, molesting, or wounding the alleged victim;
- c. That the defendant refrain from removing, damaging or injuring specifically identified property;
- d. That the defendant may visit his or her child or children at times and places provided by the terms of any existing order entered by a judge.

The conditions set forth above may be imposed in addition to requiring that the defendant execute a secured appearance bond.

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* * *

(b) A defendant may be retained in custody not more than 48 hours from the time of arrest without a determination being made under this section by a judge. If a judge has not acted pursuant to this section within 48 hours of arrest, the magistrate shall act under the provisions of this section.

In challenging the constitutionality of this statute, defendant carries a heavy burden. *Barringer v. Caldwell County Bd. Of Educ.*, 123 N.C. App. 373, 378, 473 S.E.2d 435, 438 (1996). "A strong presumption exists in favor of constitutionality, and a statute will not be declared unconstitutional unless it is clearly so, or the statute cannot be upheld on any ground. Moreover, 'a mere doubt [as to constitutionality] does not afford sufficient reason for a judicial declaration of invalidity.' " *Id.* at 378, 473 S.E.2d at 438-39 (citations omitted).

The Double Jeopardy Clause of U.S. Const. amend. V states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." One of the protections afforded by this clause is the prohibition against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 665 (1969). Defendant relies on *Helper*, as cited in the district court's order, to support his argument that his detention without bond for nearly 48 hours constituted punishment for purposes of double jeopardy. In *Helper*, defendant was charged with and convicted of 65 counts of violating 18 U.S.C. § 287, the criminal false-claims statute, for which he was sentenced to two years' imprisonment and fined \$5,000.00. *Helper*, 490 U.S. at 437, 104 L. Ed. 2d at 495. The Government subsequently brought an action against defendant pursuant to the civil False Claims Act, 31 U.S.C. §§ 3729-3731. *Helper*, 490 U.S. 438, 104 L. Ed. 2d at 495. The question presented to the Court was whether the penalty authorized by the False Claims Act, which would subject defendant to fines of \$130,000.00 for false claims amounting to \$585.00, constituted a second punishment for double jeopardy purposes. *Id.* at 441, 104 L. Ed. 2d at 497. In addressing this issue, the Court recognized that "punishment serves the twin aims of retribution and deterrence," and that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment . . ." *Id.* at 448, 104 L. Ed. 2d at 502. The Court then held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an

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additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 448-49, 104 L. Ed. 2d at 502. Because "the disparity between . . . the Government's costs and Halper's \$130,000 liability [was] sufficiently disproportionate that the sanction constitute[d] a second punishment in violation of double jeopardy," the Court remanded the case to the district court to permit the Government to demonstrate the district court's assessment of its damages was erroneous. *Id.* at 452, 104 L. Ed. 2d at 504.

In analyzing the double jeopardy issue with respect to civil sanctions, this Court recently stated:

Our . . . Supreme Court . . . has noted that *Halper* did not hold that every civil sanction be viewed as punishment; rather, *Halper* is a "rule for the rare case." A civil sanction may invoke double jeopardy protections as a form of "punishment" only if it is grossly disproportionate to legitimate State goals separate from those served by criminal prosecution. . . . Neither the severity of the sanction nor the fact that it has a deterrent purpose automatically establishes that it is a form of punishment. Nor does the fact that the sanction has a punitive component invoke double jeopardy protection where the government's remedial interests are tightly intertwined with its punitive interests.

State v. Davis, 126 N.C. App. 415, 419, 485 S.E.2d 329, 332 (1997) (citations omitted) (holding that school expulsion is not punishment invoking double jeopardy protection). *See also State v. Oliver*, 343 N.C. 202, 470 S.E.2d 16 (1996) (holding that ten-day driver's license revocation and \$50.00 license restoration fee do not constitute punishment barring subsequent DWI prosecution under the double jeopardy clause).

Noting that "*Halper's* test for determining whether a particular sanction is 'punitive,' and thus subject to the strictures of the Double Jeopardy Clause, has proved unworkable[,] the United States Supreme Court, in *Hudson v. United States*, 522 U.S. ___, ___, ___ L. Ed. 2d ___, ___ (1997), recently disavowed in large part *Halper's* method of analysis. In *Hudson*, the Court held that administratively imposed monetary penalties and occupational debarment for violations of federal banking statutes were civil, and not criminal penalties, and that the subsequent criminal prosecution of petitioners for the same conduct for which they had already been civilly sanctioned did not violate the Double Jeopardy Clause. *Id.* at ___, ___ L. Ed. 2d

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at —. In reaching this conclusion, the Court acknowledged that “all civil penalties have some deterrent effect. If a sanction must be ‘solely’ remedial (i.e., entirely nondeterrent) to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause.” *Id.* at —, — L. Ed. 2d at — (citations omitted). The Court also recognized that *Halper*’s method of analysis “focused on whether the sanction, regardless of whether it was civil or criminal, was so grossly disproportionate to the harm caused as to constitute ‘punishment.’” *Id.* at —, — L. Ed. 2d at —. The Court concluded that the determination of whether a particular punishment was civil or criminal in nature required a review of the factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, — (1963). *Hudson*, 522 U.S. at —, — L. Ed. 2d at —. These factors include:

- (1) “[w]hether the sanction involves an affirmative disability or restraint”; (2) “whether it has historically been regarded as a punishment”; (3) “whether it comes into play only on a finding of scienter”; (4) “whether its operation will promote the traditional aims of punishment-retribution and deterrence”; (5) “whether the behavior to which it applies is already a crime”; (6) “whether an alternative purpose to which it may rationally be connected is assignable for it”; and (7) “whether it appears excessive in relation to the alternative purpose assigned.”

Id. The Court stated, however, that no one factor should be controlling. *Id.* at —, — L. Ed. 2d at —.

We are aware that the double jeopardy issues raised in both *Halper* and *Hudson* involve the imposition of criminal and civil sanctions, and not the imposition of multiple criminal punishments. Nevertheless, several cases have employed the *Kennedy* factors in determining whether pretrial detention constitutes punishment without proof of guilt in violation of due process. See *Schall v. Martin*, 467 U.S. 253, 81 L. Ed. 2d 207 (1984); *United States v. Salerno*, 481 U.S. 739, 95 L. Ed. 2d 697 (1987). We therefore find these factors helpful in determining whether N.C. Gen. Stat. § 15A-534.1 is regulatory or punitive in nature.

Applying the *Kennedy* factors in the instant case, we acknowledge that while pretrial detention without bond invokes an affirmative restraint, “the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.” *Salerno*, 481 U.S. at 746, 95 L. Ed. 2d at 708. It is evident

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the intent of N.C. Gen. Stat. § 15A-534.1 is to protect victims of domestic violence from further harm by their abusers and to provide a period of time in which inflamed tempers may abate. This statute, which was originally enacted as part of 1979 N.C. Sess. Laws ch. 561, "An Act to Provide Remedies for Domestic Violence," authorizes the detention of a defendant for a reasonable period of time upon a determination that the immediate release of the defendant would pose a danger of injury or intimidation to the victim, and that an appearance bond would not reasonably assure that such injury or intimidation would not occur. N.C. Gen. Stat. § 15A-534.1(a)(1). As the Supreme Court recognized in *Schall*, "there is nothing inherently unattainable about a prediction of future criminal conduct." 467 U.S. at 278, 81 L. Ed. 2d at 226. The conditions of pretrial release found in N.C. Gen. Stat. § 15A-534.1(a)(2) are also intended to shield victims from further harm, as evidenced by the restrictions they impose on a defendant's contact with a victim's person and property. "The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted." *Schall*, 467 U.S. at 264, 81 L. Ed. 2d at 217 (citation omitted).

N.C. Gen. Stat. § 15A-534.1 was amended in 1995 to provide that the determination of pretrial release conditions shall be made by a judge rather than a magistrate, and also to provide that a defendant may not be held more than 48 hours without having conditions of pretrial release set. 1995 N.C. Sess. Laws ch. 527, § 3. Since N.C. Gen. Stat. § 15A-534.1 as originally enacted did not allow for detention of up to 48 hours or require a judge to determine conditions of pretrial release, it is apparent that the purpose of the amendment was to allow not only for the safety of domestic violence victims, but also to permit a judge to determine conditions of pretrial release for those defendants charged with crimes of domestic violence. It is significant that N.C. Gen. Stat. § 15A-534.1 does not *require* pretrial detention or prescribe any minimum period of detention. Thus, a defendant will not necessarily be detained under the statute. However, if a judge does not act within 48 hours from the time of a defendant's arrest, as can be the case when weekends are involved, a determination as to conditions of pretrial release must be made by a magistrate. N.C. Gen. Stat. § 15A-534.1(b). The statute, therefore, cannot be said to further the goals of retribution or deterrence, but rather to promote the safety of domestic violence victims, allow for the cooling of tempers and permit a judge to set conditions of pretrial release for defendants charged with crimes of domestic violence.

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Additionally, in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56, 114 L. Ed. 2d 49, 63 (1991), the Supreme Court held that pretrial detention of up to 48 hours for the purpose of determining probable cause is constitutionally permissible. In light of this, we believe pre-trial detention without bond for up to 48 hours as authorized by N.C. Gen. Stat. § 15A-534.1 is not excessive in relation to the goals sought to be achieved by the statute.

For the foregoing reasons, we conclude N.C. Gen. Stat. § 15A-534.1 is regulatory, and not punitive in nature, and therefore does not constitute punishment for purposes of double jeopardy. Thus, further prosecution of defendant for the crimes with which he was charged will not violate the Double Jeopardy Clause of U.S. Const. amend. V.

[4] Defendant also contends the superior court erred by concluding that N.C. Gen. Stat. § 15A-534.1 does not violate the Due Process Clauses of either the United States Constitution or the North Carolina Constitution, or any other substantive law. He argues that the statute is unconstitutional as applied to him because its operation denied him his fundamental right to liberty and guarantees of freedom from excessive bail. However, defendant's assignments of error with respect to these arguments attack only the facial validity of the statute, and not the constitutionality of the statute as applied to defendant. Thus, pursuant to N.C.R. App. P. 28(b)(5), defendant has waived any challenge to the constitutionality of the statute as applied to him. Further, defendant has also failed to present arguments regarding excessive bail or any other state constitutional violations. Thus, defendant has waived any further consideration of those issues.

The Due Process Clause of U.S. Const. amend. V states that no person shall "be deprived of life, liberty, or property, without due process of law . . ." The Due Process Clause protects against two types of government action: substantive due process prevents the government from engaging in conduct that " 'shocks the conscience' " or interferes with rights " 'implicit in the concept of ordered liberty,' " and procedural due process ensures that government action depriving a person of life, liberty or property is implemented in a fair manner. *Salerno*, 481 U.S. at 746, 95 L. Ed. 2d at 708 (citations omitted).

Defendant cites *Salerno*, which involved a challenge to the Bail Reform Act of 1984, in support of his argument that N.C. Gen. Stat. § 15A-534.1 violates due process. In *Salerno*, the Supreme Court held that the Bail Reform Act did not violate substantive or procedural due

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process. *Salerno*, 481 U.S. at 752, 95 L. Ed. 2d at 712. Nevertheless, defendant argues that a comparison of N.C. Gen. Stat. § 15A-534.1 and the Bail Reform Act shows that N.C. Gen. Stat. § 15A-534.1 violates due process since it lacks the procedural safeguards contained in the Bail Reform Act.

The Bail Reform Act of 1984 permitted federal courts to detain arrestees pending trial if the government demonstrated by clear and convincing evidence after an adversarial hearing that no release conditions would “reasonably assure . . . the safety of any other person and the community” *Salerno*, 481 U.S. at 741, 95 L. Ed. 2d at 705. The Act also provided that arrestees had the right to request counsel, to testify, to present witnesses, to offer evidence, and to cross-examine other witnesses at the detention hearing, and also set forth factors to be considered in making the detention decision, including the nature and seriousness of the charges and of the danger posed by release, the substantiality of the government’s evidence, and the arrestee’s background and characteristics. *Id.* at 742-43, 95 L. Ed. 2d at 705-06. While these characteristics are admittedly lacking from N.C. Gen. Stat. § 15A-534.1, N.C. Gen. Stat. § 15A-534.1 does not require pretrial detention, whereas the Bail Reform Act required complete pretrial detention with no conditions of release. Thus, we believe a comparison between the two statutes is inappropriate.

[5] We next address the issue of whether N.C. Gen. Stat. § 15A-534.1 violates substantive due process.

In determining whether a law violates substantive due process, the United States Supreme Court long ago formulated a two-tiered test: if the right infringed upon is a “fundamental” right, then the law will be viewed with strict scrutiny and the party seeking to apply the law must demonstrate a compelling state interest for the law to survive a constitutional attack; if the right infringed upon is not a fundamental right, then the party applying the law need only demonstrate that the statute is rationally related to a legitimate state interest.

Dixon v. Peters, 63 N.C. App. 592, 598, 306 S.E.2d 477, 481 (1983) (citing *Williamson v. Lee Optical*, 348 U.S. 483, 99 L. Ed. 2d 563 (1955)).

Under either level of scrutiny, N.C. Gen. Stat. § 15A-534.1 cannot be said to violate substantive due process. As mentioned previously, the State has a legitimate and compelling interest in preventing crime. *Schall*, 476 U.S. at 264, 81 L. Ed. 2d at 217. Because domestic

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violence is unfortunately a growing problem in our society, we believe the State has a legitimate and compelling interest in allowing judges who are experienced in criminal and domestic matters to determine the conditions of pretrial release for those who have been charged with domestic violence crimes. While we acknowledge “the importance and fundamental nature” of an “individual’s strong interest in liberty,” *Salerno*, 481 U.S. at 750, 95 L. Ed. 2d at 711, it is well established that the government, in certain circumstances, has the authority to “restrain individuals’ liberty prior to or even without criminal trial and conviction” *Id.* at 749, 95 L. Ed. 2d at 710. Thus, we conclude pretrial detention without bond for up to 48 hours as authorized by N.C. Gen. Stat. § 15A-534.1 does not violate substantive due process.

[6] We now turn to the issue of whether N.C. Gen. Stat. § 15A-534.1 violates procedural due process. In *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33 (1976), the Supreme Court set forth three factors to be considered in analyzing due process problems:

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Keeping in mind the importance of an individual’s liberty interest, we do not believe N.C. Gen. Stat. § 15A-534.1 violates procedural due process. The statute provides that defendant shall receive a hearing and have pretrial release conditions determined within 48 hours of arrest, N.C. Gen. Stat. § 15A-534.1(b), and also requires that the officer determining pretrial release conditions be a judge. N.C. Gen. Stat. § 15A-534.1(a). Further, as mentioned earlier, it is constitutionally permissible for a defendant to be detained for up to 48 hours. *County of Riverside*, 500 U.S. at 56, 114 L. Ed. 2d at 63. Thus, N.C. Gen. Stat. § 15A-534.1 cannot be said to violate procedural due process.

We therefore conclude the trial court properly held that N.C. Gen. Stat. § 15A-534.1 does not violate either the Double Jeopardy or Due Process Clauses of the United States Constitution. We have carefully reviewed defendant’s remaining assignments of error and find them to be without merit. This case is remanded to the superior court for further remand to the district court.

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Affirmed and remanded.

Chief Judge ARNOLD and Judge MARTIN, John C., concur.

STATE OF NORTH CAROLINA v. HERBERT MELTON JACOBS

No. COA97-127

(Filed 17 February 1998)

1. Rape and Allied Sexual Offenses § 116 (NCI4th)—second-degree sexual offense—evidence of force—sufficient

The trial court did not err in denying defendant's motion to dismiss charges of second-degree sexual offense where there was sufficient evidence of force.

2. Evidence and Witnesses § 2415 (NCI4th)— motion to declare a material witness—testimony cumulative—motion denied

The trial court did not abuse its discretion in the prosecution of a scoutmaster for sexual offenses by denying defendant's motion that a former scout then serving in the U.S. Army in Korea be declared a material witness. This testimony was not necessary to refute other testimony of the State's theory of a "common scheme" to molest boys in the scout troop; moreover, it would have been cumulative, and, as such, not material to guilt or innocence.

3. Indictment, Information, and Criminal Pleadings § 43 (NCI4th)— bill of particulars denied—no error

The trial court did not abuse its discretion in the prosecution of a scoutmaster for sexual offenses by denying defendant's motion for a bill of particulars. Defendant committed sexual offenses at various times over a period of years, the State provided as much specific information as to the time of the various incidents as was available, there is no contention that the State's proof at trial was more specific as to dates than the information which had been provided to defendant, and defendant failed to show that his defense was significantly impaired by the lack of information sought in the bill of particulars.

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4. Criminal Law § 837 (NCI4th Rev.)— sexual offenses—instructions—reference to victims—no error

The trial court did not commit plain error in the prosecution of a scoutmaster for sexual offenses by using “victims” when referring to the complainants where the court used the term to describe the required elements of the various offenses and its use of the word could not reasonably have been understood as an expression of an opinion as to defendant’s guilt or innocence.

5. Constitutional Law § 327 (NCI4th)— speedy trial—no violation

Defendant-scoutmaster’s constitutional rights to a speedy trial for sexual offenses were not violated where the acts were committed in the early 1980’s; defendant was originally arrested in 1990; those charges were voluntarily dismissed by the State and the record of the charges was expunged at defendant’s request in 1990; warrants for the current charges were issued in November of 1993; defendant was indicted in June 1994; and his trial commenced in May 1996. The length of the delay triggers the exam in *Barker v. Wingo*, 407 U.S. 514, but defendant contributed significantly to the delay by seeking extensions of time; defendant first asserted his right to a speedy trial nearly two and a half years after the warrants were issued for the current charges; and defendant failed to show prejudice by the delay.

6. Criminal Law § 669 (NCI4th Rev.)— prior voluntary dismissal—records expunged—investigative records retained

Defendant-scoutmaster’s rights to due process were not violated by the district attorney retaining investigative records where defendant was charged with sexual offenses in 1990; those charges were voluntarily dismissed by the State; the record of these charges was expunged at defendant’s request in 1993; and the district attorney’s office retained investigative materials. Neither N.C.G.S. § 15A-146 nor the order of expunction requires destruction of investigative files; moreover defendant showed no prejudice.

7. Constitutional Law § 171.1 (NCI4th)— double jeopardy—former prosecution—voluntary dismissal

Defendant was not subjected to double jeopardy where a former prosecution for sexual offenses was voluntarily dismissed by the State before a jury had been empaneled.

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Appeal by defendant from judgments entered 28 May 1996 by Judge Ronald K. Payne in Gaston County Superior Court. Heard in the Court of Appeals 9 October 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Margaret A. Force, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

MARTIN, John C., Judge.

Defendant was indicted on 6 June 1994 upon four counts of second degree sexual offense, four counts of taking indecent liberties with a minor, and one count of crime against nature. The offenses were alleged to have occurred at various times between 1 June 1980 and 30 September 1983. The alleged victims were Kelly Collins and Glenn Clark, both of whom were alleged to have been under the age of 16 years at the time. Defendant entered pleas of not guilty.

The State offered evidence tending to show that defendant, who was more than thirty years of age, was a Boy Scout scoutmaster in Gastonia when Glenn Clark, then twelve years of age, joined his scout troop in November 1979. Kelly Collins became involved in defendant's scout troop in 1981, when he was twelve years old. Both Collins and Clark testified they were small for their age.

Briefly summarized, Collins testified that he looked up to defendant as a father figure. Defendant often invited Collins to defendant's apartment, or took him to movies, swimming, or to play putt-putt golf. Collins testified that on several occasions, he spent the night at defendant's apartment and that defendant came into the room where he was sleeping and kissed him, rubbed him and fondled his penis with his hand. After defendant moved from the apartment to a house, Collins spent the night with defendant. During the night, defendant came into the room where Collins was sleeping, removed his shorts, and performed fellatio on him. Collins testified that he was afraid and did not tell anyone about the incidents at the time. He quit the Boy Scouts when he was fifteen. After Collins was in college, he confided in his girlfriend and a track coach about the incidents.

Clark testified that defendant often invited him over to his apartment or his house and often served him alcoholic beverages. On one occasion, defendant played a game with him which required Clark to

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remove articles of clothing, after which defendant fondled his penis and performed fellatio on him. Clark testified about several other occasions, involving both scouting activities and visits to defendant's apartment and house, when defendant engaged in similar conduct, fondling him and performing fellatio on him. On two occasions, one in June or July of 1983 and the other in September of 1983, defendant had forcible anal intercourse with Clark at defendant's house.

The State also offered the testimony of three other witnesses, Steven Johnson, Brian Thomas and Paul Lyman, who testified that defendant had also been their scoutmaster. They described various incidents in which defendant had engaged in similar conduct with them when they were young teenagers.

Defendant offered the testimony of Mary Cook, a social worker who had investigated defendant to determine his suitability to adopt a child. Ms. Cook testified that she had made several visits to defendant's home, including surprise visits, and had never observed any unusual conduct. She approved him for adoption. Several of defendant's former scout troop members testified that they had often spent the night at defendant's residence on weekends and had neither experienced nor observed any inappropriate sexual behavior. In addition, defendant offered testimony of parents of former scouts, as well as other scout leaders, to the effect that they had never observed any inappropriate behavior on defendant's part. Finally, defendant's adopted son testified that he had never been sexually abused by defendant.

The jury found defendant guilty of three counts of second degree sexual offense, one count of crime against nature, and three counts of taking indecent liberties with a minor. He appeals from judgments imposing active terms of imprisonment totaling seventy-seven years.

In his brief, defendant has presented arguments in support of the questions raised by eight of the twenty-five assignments of error contained in the record on appeal. Pursuant to N.C.R. App. P. 28(a) defendant's remaining seventeen assignments of error are deemed abandoned. We have carefully considered defendant's arguments and find no prejudicial error in his trial.

I.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss because there was insufficient evidence of force to

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support the charges of second degree sexual offense by fellatio. G.S. § 14-27.5 provides in pertinent part:

(a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:

(1) By force and against the will of the other person.

Fellatio is included as a sexual act within the meaning of the statute. *State v. Baker*, 333 N.C. 325, 426 S.E.2d 73, *disc. review denied*, 334 N.C. 435, 433 S.E.2d 180 (1993). The phrase “by force and against the will of the other person” has the same meaning here as it does in the context of rape. *State v. Locklear*, 304 N.C. 534, 284 S.E.2d 500 (1981). The force required “need not be physical force. Fear, fright, or coercion may take the place of force.” *Id.* at 539, 284 S.E.2d at 503.

On a motion to dismiss the court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. *State v. Ethridge*, 319 N.C. 34, 352 S.E.2d 673 (1987). The judge must decide if there is substantial evidence of each element of the offenses charged. *Id.* “Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 47, 352 S.E.2d at 681.

When substantial evidence supports a finding that the crime was committed, and that a defendant is the criminal agent, the case must be submitted to the jury. The evidence need not exclude every reasonable hypothesis of innocence in order to support the denial of a defendant’s motion to dismiss.

State v. Parks, 96 N.C. App. 589, 594, 386 S.E.2d 748, 751 (1989).

Viewed in the light most favorable to the State, the evidence in this case was sufficient to submit the offenses of second degree sexual offense to the jury. Collins testified that on the occasion when defendant performed fellatio on him, he was awakened by defendant’s tongue in his mouth, and he struggled to move it away. He also testified that he tried to prevent defendant from pulling his pants down, but was unsuccessful. He explained that he was afraid of defendant because he left guns around the house and talked about his skill in using them. Clark testified that defendant “made” him take off his clothes and put on defendant’s shorts. He said that he did not consent to oral sex and tried to resist it but defendant would tell him, “Oh it’s okay. It’s okay. I love you.” He testified that he was small for his

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age and defendant, who was much bigger, would often hold him down to commit the sexual offenses. We hold there was sufficient evidence of force, including “fear, fright and coercion,” to withstand defendant’s motion to dismiss the charges.

II.

[2] Defendant next assigns error to the denial of his motion to declare Greg Stewart a material witness. In his motion, defendant asserted that Stewart would offer testimony tending to impeach that given by a State’s witness, Brian Thomas. Thomas testified that while he was a member of defendant’s scout troop, defendant had fondled his penis on two occasions and had performed fellatio on him on another occasion. Defendant asserted that Stewart, who was serving in the U.S. Army in Korea at the time of trial, would testify that he had been a member of defendant’s scout troop and had been on numerous camping trips with defendant and other scouts and that he had also spent the night at defendant’s house on numerous occasions and had never witnessed or been made aware of any inappropriate behavior on defendant’s part. Defendant argued that Stewart’s testimony was essential to contradict that given by Thomas. His motion was denied.

G.S. § 15A-803 authorizes a court to issue an order assuring the presence of a material witness and sets forth the procedure for doing so. Although the record does affirmatively show that defendant complied with the procedural requirements of the statute, we will address the issue on its substantive merits. G.S. § 15A-803(a) provides:

(a) Material Witness Order Authorized.—A judge may issue an order assuring the attendance of a material witness at a criminal proceeding. This material witness order may be issued when there are reasonable grounds to believe that the person whom the State or a defendant desires to call as a witness in a pending criminal proceeding possesses information material to the determination of the proceeding and may not be amenable or responsive to a subpoena at a time when his attendance will be sought.

N.C. Gen. Stat. § 15A-803(a) (1997). “The use of the term ‘may’ suggests that the granting or denial of a motion for a material witness order is a matter committed largely to the discretion of the judge.” *State v. Tindall*, 294 N.C. 689, 698, 242 S.E.2d 806, 811 (1978). However, this discretion must “be exercised in a manner not inconsistent with the Sixth Amendment’s guaranty that a criminal defend-

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ant be afforded ‘compulsory process for obtaining witnesses in his favor.’ ” *Id.* at 698, 242 S.E.2d at 811-12.

Contrary to defendant’s argument, Stewart was not a material witness in this case because his testimony was not necessary in order for defendant to refute that given by Thomas or to negate the State’s theory that defendant had a “common scheme” to molest boys in his scout troop. Defendant made no showing that Stewart’s testimony would relate to any of the specific incidents charged in the bills of indictment or any of those about which Thomas testified. Moreover, defendant offered a number of other witnesses, including nine former scouts and several of their parents, who testified that they had neither been sexually abused by defendant nor witnessed any inappropriate behavior by him. Stewart’s testimony on the issue would have been merely cumulative and, as such, not material to the determination of defendant’s guilt or innocence. The trial court did not abuse its discretion in denying defendant’s motion that Stewart be declared a material witness or, as argued alternatively by defendant, in denying his motion to strike Thomas’ testimony. Thomas’ testimony was relevant and properly admissible under G.S. § 8C-1, Rules 404(b) and 403. These assignments of error are overruled.

III.

[3] Next, defendant argues the trial court erred in denying his motion for a bill of particulars, which sought the specific dates on which the crimes were allegedly committed. The purpose of a bill of particular is “to inform defendant of specific occurrences intended to be investigated at trial and to limit the course of the evidence to a particular scope of inquiry.” *State v. Moore*, 335 N.C. 567, 587, 440 S.E.2d 797, 809, *cert. denied*, 513 U.S. 898, 130 L.Ed.2d 174, *reh’g. denied*, 513 U.S. 1035, 130 L.Ed.2d 532 (1994). The decision to allow or deny a motion for a bill of particulars:

is generally within the discretion of the trial court and is not subject to review “except for palpable and gross abuse thereof.” . . . [A] denial of a defendant’s motion for a bill of particulars will be held error only when it clearly appears to the appellate court that the lack of timely access to the requested information significantly impaired defendant’s preparation and conduct of his case.

Id. at 588, 440 S.E.2d at 809 (quoting *State v. McLaughlin*, 286 N.C. 597, 603, 213 S.E.2d 238, 242 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed.2d 1208 (1976)).

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No abuse of discretion has been shown here. Time is not of the essence of the offenses charged in these cases. *See State v. McKinney*, 110 N.C. App. 365, 430 S.E.2d 300, *disc. review denied*, 334 N.C. 437, 433 S.E.2d 182 (1993). The evidence showed that defendant committed the acts upon Collins and Clark at various times over a period of years. Prior to trial, the State provided as much specific information as to the time of the various incidents as was available to it and there has been no contention that the State's proof at trial was more specific as to dates than the information which had been provided to defendant. Moreover, defendant has made no showing that the preparation of his defense was significantly impaired by the lack of the information sought by his bill of particulars. Thus, we reject this assignment of error.

IV.

[4] Next defendant argues that the trial court erred in referring to the complainants in this case as "victims" in the jury instructions. Defendant did not object at trial to the court's use of the word "victims" in its instructions, and it is well known that " 'a failure to except or object to errors at trial constitutes a waiver of the right to assert the alleged error on appeal.' " *State v. Walker*, 316 N.C. 33, 37, 340 S.E.2d 80, 82 (1986) (quoting *State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983)). Nevertheless, defendant argues the court committed "plain error"; additionally, he asks that we exercise the discretion granted us by N.C.R. App. P. 2 to review the alleged error. In *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983), our Supreme Court adopted the "plain error" rule which permits review of a certain claimed error so fundamental or egregious as to have a probable impact on the outcome of the trial even though the error was not brought to the attention of the trial court by a proper objection.

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

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Walker at 39, 340 S.E.2d at 83 (quoting *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983)). The plain error rule applies only in truly exceptional cases where the appellate court is convinced that “absent the error the jury probably would have reached a different verdict.” *Id.* N.C.R. App. P. 2 permits this Court to suspend or vary the requirements of the appellate rules, “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.”

In this case, the contended error in the trial court’s jury instructions neither rises to the level of plain error nor warrants our application of Rule 2. Before defining the elements of the various offenses, the trial court carefully explained that it would refer to the names of the “*alleged* victims” in discussing the charges. The court used the term “victim” in its instructions simply to define and describe the required elements of the various offenses; its use of the word could not reasonably have been understood as an expression of an opinion as to defendant’s guilt or innocence. Defendant has shown neither manifest injustice nor a probable effect on the outcome of the trial as a result of the trial court’s use of the word “victim.” This assignment of error is overruled.

V.

[5] Next, defendant argues that the court erred in denying his pretrial motion to dismiss on speedy trial, double jeopardy, and due process grounds. Defendant was originally arrested in October 1990 for sexual offenses allegedly committed against Collins. Those charges were voluntarily dismissed by the State, and the record of those charges was expunged in 1991 at defendant’s request. Warrants for the current charges against defendant were issued in November 1993; he was indicted in June 1994; and his trial commenced on 20 May 1996.

There are four factors which the court should consider in determining whether a criminal defendant has been denied his right to a speedy trial, guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 18 of the North Carolina Constitution. Those factors are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant’s assertion of his right to a speedy trial, and (4) whether the defendant has suffered prejudice as a result of the delay. *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed.2d 101 (1972); *State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997).

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The length of the delay is not per se determinative of whether the defendant has been deprived of his right to a speedy trial. The United States Supreme Court has found post-accusation delay “presumptively prejudicial” as it approaches one year. However, presumptive prejudice “does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker enquiry.”

Id. (quoting *Doggett v. United States*, 505 U.S. 647, 652 n.1, 120 L.Ed.2d 520, 528 n.1 (1992)). In this case, the length of the delay triggers the *Barker* examination.

With respect to the reason for the delay, defendant has the burden of showing that the delay was caused by the neglect or willfulness of the prosecution. *Id.* Here defendant has not shown such neglect or willfulness by the prosecution; in fact, the record suggests that defendant contributed significantly to the delay. His former counsel, Stephen Gheen testified that in October 1994 defendant asked for a delay in his arraignment in order to consider whether to appeal the trial court’s rulings with respect to earlier defense motions. Mr. Gheen also testified that the State had reluctantly agreed to defendant’s requests for other extensions of time, and that defense motions with respect to the production of medical records had resulted in delays. Additionally, delays were occasioned by the withdrawal and replacement of defendant’s co-counsel. Thus, defendant has not shown, as required, that the delay resulted from “neglect and willfulness” on the part of the State.

Defendant first asserted his right to a speedy trial in a motion filed 17 April 1996, nearly two and a half years after the warrants were issued for the current charges. “Defendant’s failure to assert his right to a speedy trial sooner in the process does not foreclose his speedy trial claim, but does weigh against his contention that he has been denied his constitutional right to a speedy trial.” *Flowers* at 28, 489 S.E.2d at 407.

Defendant has also failed to show prejudice by the delay. The only ways in which defendant argues he was prejudiced is by the unavailability of Greg Stewart as a witness and the unavailability of certain investigative materials gathered in connection with the investigation of the 1990 charges. As we have previously discussed, Stewart’s presence as a witness was not essential since there were numerous other witnesses who testified with respect to the same

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information which he possessed; hence, defendant was not prejudiced by his unavailability. The destruction of the earlier investigative materials did not result from the pre-trial delay; rather, the materials were destroyed by the police in order to comply with the court's order granting defendant's request that records relating to the voluntarily dismissed 1990 charges against him be expunged. We hold that defendant's constitutional right to a speedy trial has not been violated.

[6] Defendant also argues that his rights to due process were violated because the district attorney's office retained investigative materials relating to the 1990 charges even though the court had ordered expunction of entries relating to those charges from the public records. G.S. § 15A-146 authorizes the court, in certain instances, to order expunction from all official records of entries relating to the arrest or trial of a person seeking the order. The purpose of the statute is to clear the public record of entries so that a person who is entitled to expunction may omit reference to the charges to potential employers and others, and so that a records check for prior arrests and convictions will not disclose the expunged entries. Neither the statute nor the order of expunction entered at defendant's request requires the destruction of investigative files. Moreover, defendant has shown no prejudice. We find no violation of due process and reject his argument.

[7] Nor do we find a violation of defendant's right against being twice placed in jeopardy for the same offense. The former prosecution was voluntarily dismissed by the State before a jury had been empaneled and before jeopardy had attached. *State v. Strickland*, 98 N.C. App. 693, 391 S.E.2d 829, *disc. review denied*, 327 N.C. 436, 395 S.E.2d 695 (1990).

VI.

In his final assignment of error defendant asserts the court erred in ruling that there was nothing of exculpatory value in the medical records of Glenn Clark, Brian Thomas and Kelly Collins. The records were reviewed *in camera* by the trial court, which found nothing of exculpatory value therein. Defendant requests that we review the record to determine if there are any materials which should have been disclosed pursuant to *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215 (1963) and *Pennsylvania v. Ritchie*, 480 U.S. 39, 94 L.Ed.2d 40 (1987). We have done so and agree with the trial court's ruling.

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Defendant received a fair trial, free from prejudicial error.

No error.

Judges LEWIS and McGEE concur.

MITCHELL EDWARDS AND WIFE, DAPHNE EDWARDS, PLAINTIFFS-APPELLEES v. JOSEPH ROBERT WEST D/B/A CENTURY 21 WEST & COMPANY, AND BOB WEST, INC., DEFENDANTS-APPELLANTS

No. COA96-261

(Filed 17 February 1998)

1. Contracts § 148 (NCI4th)—sale of lot—acreage reduced—breach of contract—evidence sufficient

The trial court did not err in denying defendants' motion for a directed verdict at the close of all evidence on a breach of contract claim arising from the sale of a lot in a subdivision where there was more than a scintilla of evidence that the lot was smaller than first represented and that a breach of contract occurred.

2. Unfair Competition or Trade Practice § 43 (NCI4th)—sale of lot—acreage reduced—disclosure delayed—directed verdict for defendants—denied

The trial court did not err by denying defendants' motion for a directed verdict on an unfair or deceptive practice claim arising from the attempted sale of a lot where there was evidence that defendants made a definite and specific representation of the acreage through the use of a plat and did not plan to tell plaintiffs about a reduction in acreage until closing. Defendants had a duty to disclose the change as soon as possible instead of attempting to wait until the last minute.

3. Unfair Competition or Trade Practice § 42 (NCI4th)—sale of lot—acreage reduced—unfair or deceptive act—causation—evidence sufficient

There was no merit to defendants' contention that plaintiff buyers failed to present sufficient evidence of causation to require submission of damages to the jury on an unfair and deceptive trade practice claim arising from plaintiffs' attempted

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purchase of a lot which was reduced in size after the purchase contract was signed.

**4. Unfair Competition or Trade Practices § 54 (NCI4th)—
sale of lot—acreage reduced—unfair or deceptive act—
attorney's fees—no error**

There was ample evidence to support an award of attorney fees under N.C.G.S. § 75-16.1 where defendants changed a plat to reduce the acreage of a lot after plaintiffs signed a purchase contract.

Appeal by defendants from judgment entered 22 September 1995 in Cumberland County Superior Court by Judge Wiley F. Bowen. This case was originally heard in the Court of Appeals on 31 October 1996 and the appeal was dismissed on 18 March 1997. *Edwards v. West*, 125 N.C. App. 742, 483 S.E.2d 746 (1997). The Supreme Court of North Carolina reversed and remanded to the Court of Appeals on 7 November 1997. *Edwards v. West*, 347 N.C. 351, 492 S.E.2d 356 (1997). Reheard in the Court of Appeals on remand 12 January 1998.

Garris Neil Yarborough for plaintiff appellees.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins, for defendant appellants.

SMITH, Judge.

This case arises from an October 1993 incident, when defendant Century 21 West & Company ("Century 21 West") contracted to sell plaintiffs Mitchell and Daphne Edwards' Lot 4 in the "Starwood at Overhill" subdivision for \$105,000.00. Plaintiffs, first-time home buyers, retained defendant real estate agency Century 21 West for their professional assistance in purchasing a home. Defendant Joseph Robert West controlled both Century 21 West and another business known as Bob West, Incorporated ("Bob West, Inc.").

Once plaintiffs retained the services of Century 21 West, sales agent Ann Shrump ("Shrump") directed plaintiffs to Lot 4 on which Bob West, Inc., had exercised its option to purchase. During the negotiations for the purchase price, plaintiffs were given a plat by Shrump outlining the boundaries of the lot. The plat indicated the acreage of the lot to be 1.88 acres, making it the largest lot in the subdivision. In August 1993, the plat filed with Harnett County Registry showed the

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acreage of Lot 4 as 1.88 acres. Based on this information, plaintiffs executed an offer to purchase and contract on 11 October 1993.

However, plaintiffs later discovered the actual acreage of Lot 4 was reduced to 1.41 acres. A new plat was recorded at the Harnett County Registry on 19 January 1994, without plaintiffs' knowledge. As a result of this discovery, the parties attempted to renegotiate the contract so plaintiffs would still purchase the lot. The negotiations were unsuccessful. On 23 August 1994, plaintiffs filed a complaint against defendant Joseph Robert West, doing business as Century 21 West, and Bob West, Inc., alleging breach of contract, negligence, fraud, and unfair and deceptive trade practice claims.

Following trial, the jury returned a verdict in favor of plaintiffs. Thereafter, the trial court trebled the damages and awarded attorneys fees to plaintiffs. Defendants appeal.

Before we address the merits of this case, we note that appellants have failed to comply with N.C.R. App. P. 9(a)(1)(I) and 26(a) and (d). There is no certification in the record signifying when or if a proposed record on appeal was ever served on plaintiffs by defendant appellants. Defendant appellants have the burden of ensuring "that all necessary papers are before the appellate court." *Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563, 402 S.E.2d 407, 408 (1991). Notwithstanding this omission, pursuant to the mandate of our Supreme Court and the authority of *Hale v. Afro-American Arts International, Inc.*, 335 N.C. 231, 436 S.E.2d 588 (1993), we address defendants' appeal.

Appellate review is limited to those exceptions which pertain to the argument presented. *Crockett v. First Fed. Sav. & Loan Assoc. of Charlotte*, 289 N.C. 620, 632, 224 S.E.2d 580, 588 (1976). To obtain appellate review, a question raised by an assignment of error must be presented and argued in the brief. *In re Appeal from Environmental Management Comm.*, 80 N.C. App. 1, 18, 341 S.E.2d 588, 598, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 139 (1986). Questions raised by assignments of error which are not presented in a party's brief are deemed abandoned. *State v. Wilson*, 289 N.C. 531, 535, 223 S.E.2d 311, 313 (1976). Defendants' brief failed to address assignment of error number 4. Therefore, this assignment of error is deemed abandoned.

We also note that defendants' assignments of error regarding the breach of contract and unfair and deceptive trade practice claims

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both allege the trial court erred in denying defendants' motion for directed verdict at the close of plaintiffs' evidence. It is unnecessary to undertake a determination of whether plaintiffs' evidence, standing alone, was sufficient to withstand a motion for directed verdict. By offering evidence, defendants waived their motion for a directed verdict made at the close of plaintiffs' evidence. *Bumgarner v. Tomblin*, 92 N.C. App. 571, 574, 375 S.E.2d 520, 522, *disc. review denied*, 324 N.C. 333, 378 S.E.2d 789 (1989). Therefore, we address these assignments of error only as they relate to the motion for directed verdict made at the close of all evidence.

The standard of review for a directed verdict at the close of all evidence is that "the trial court must determine whether the evidence, when considered in the light most favorable to the non-movant, is sufficient to take the case to the jury." *Southern Bell Tel. & Tel. Co. v. West*, 100 N.C. App. 668, 670, 397 S.E.2d 765, 766 (1990), *aff'd*, 328 N.C. 566, 402 S.E.2d 409 (1991). The party moving for a directed verdict bears a heavy burden in North Carolina. *Taylor v. Walker*, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987). The court should deny a motion for directed verdict when there is more than a scintilla to support plaintiffs' *prima facie* case. *Southern Ry. v. O'Boyle Tank Lines Inc.*, 70 N.C. App. 1, 4, 318 S.E.2d 872, 875 (1984). Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and submit the case to the jury. *Tice v. Hall*, 63 N.C. App. 27, 37, 303 S.E.2d 832, 838 (1983), *aff'd*, 310 N.C. 589, 313 S.E.2d 565 (1984).

[1] The first issue on appeal is whether the trial court erred in denying defendants' motion for directed verdict at the close of all evidence on the breach of contract claim. In the instant case, the evidence is sufficient to take the case to the jury on plaintiffs' cause of action for breach of contract. Viewing the evidence in the light most favorable to plaintiffs, the evidence shows that plaintiffs, first-time home buyers, retained defendant Century 21 West to assist in purchasing a home. During the negotiations, Century 21 West sales agent Shrump gave plaintiffs a plat delineating the boundaries of the lot. Defendants represented that the 1.88-acre lot was the largest lot in the subdivision. Based on these representations, plaintiffs entered into a contract to purchase Lot 4 with a house built on it because all the lots had the same purchase price and Lot 4 would be the best bargain. Upon discovery that the lot was only 1.41 acres, plaintiffs thought they were not getting the good deal they bargained for with

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defendants. Negotiations between the parties to correct the mistake failed and plaintiffs never purchased the lot. This evidence provides more than a scintilla of evidence that a breach of contract occurred. Thus, this issue was properly submitted to the jury and this assignment of error is overruled.

[2] The second issue is whether the trial court erred in denying defendants' motion for directed verdict at the close of all evidence on the fraud claim pursuant to N.C. Gen. Stat. §§ 75-1.1 and 75-16 (1994). A claim pursuant to these statutes is typically known as an unfair and deceptive trade practice claim. An unfair and deceptive trade practice claim requires plaintiffs to show: (1) that defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) plaintiffs were injured thereby. *Canady v. Mann*, 107 N.C. App. 252, 260, 419 S.E.2d 597, 602 (1992), *disc. review improvidently allowed*, 333 N.C. 569, 429 S.E.2d 348 (1993). Plaintiffs must also establish they "suffered actual injury as a proximate result of defendants' misrepresentations." *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 184, 268 S.E.2d 271, 273-74 (1980).

N.C. Gen. Stat. § 75-1.1. states that a trade practice is unfair if it "is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980), *overruled on other grounds*, *Myers v. Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988)). Furthermore, a trade practice is deceptive if it "has the capacity or tendency to deceive." *Id.* at 265, 266 S.E.2d at 622. "[I]t is a question of law for the court as to whether these proven facts constitute an unfair or deceptive trade practice." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993).

Viewing the evidence in the light most favorable to plaintiffs, the evidence in the instant case is sufficient to support an unfair and deceptive trade practice claim. Defendants concede the events giving rise to the lawsuit were acts affecting commerce. However, defendants argue plaintiffs did not show defendants' acts had the capacity to mislead or deceive and, further, that plaintiffs failed to present sufficient evidence of causation regarding damages in order for the court to present the issue to the jury.

To prevail on an unfair and deceptive trade practice claim, deliberate acts of deceit or bad faith do not have to be shown. *Forsyth Memorial Hospital, Inc. v. Contreras*, 107 N.C. App. 611, 614, 421

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S.E.2d 167, 169-70 (1992), *disc. review denied*, 333 N.C. 344, 426 S.E.2d 705 (1993). Instead, plaintiffs must demonstrate the act “ ‘possessed the tendency or capacity to mislead, or created the likelihood of deception.’ ” *Id.* (quoting *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 453, 279 S.E.2d 1, 7 (1981)). In addition, “ ‘[a] party is guilty of an unfair act or practice when it engages in conduct; which amounts to an inequitable assertion of its power or position.’ ” *Bolton Corp. v. T. A. Loving Co.*, 94 N.C. App. 392, 411-12, 380 S.E.2d 796, 808 (1989) (quoting *Johnson v. Phoenix Mut. Life Insurance Co.*, 300 N.C. at 264, 266 S.E.2d at 622), *disc. review denied*, 325 N.C. 545, 385 S.E.2d 496 (1989).

The element of deception was present in the instant case because the plat given by defendants possessed the tendency or capacity to mislead plaintiffs into thinking plaintiffs were getting the largest lot. A claim of unfair and deceptive trade practice can be established against realtors by proving either fraud or negligent misrepresentation in the commercial setting. *See Powell v. Wold*, 88 N.C. App. 61, 68, 362 S.E.2d 796 (1987). Defendants made a definite and specific representation to plaintiffs, through the use of a plat, that the acreage for the property was 1.88 acres. However, defendants did not plan to tell plaintiffs about the change in acreage until closing. Defendants had a duty to disclose the change as soon as possible instead of attempting to wait until the last minute. The evidence of defendants’ misrepresentations supports the court’s conclusion that defendants’ unfair or deceptive act or practice caused injury to plaintiffs. *See Process Components, Inc. v. Baltimore Aircoil, Inc.*, 89 N.C. App. 649, 654, 366 S.E.2d 907, 911, *aff’d*, 323 N.C. 620, 374 S.E.2d 116 (1988).

[3] As to defendants’ contention that plaintiffs failed to present sufficient evidence of causation to require submission of the issue of damages on the unfair and deceptive trade practice claim to the jury, this Court has previously held that whether plaintiffs’ damages were the proximate result of defendants’ actions is almost always a question of fact for the jury. *Winston Realty Co., Inc. v. G.H.G., Inc.*, 70 N.C. App. 374, 380, 320 S.E.2d 286, 290 (1984), *aff’d*, 314 N.C. 90, 331 S.E.2d 677 (1985). Plaintiffs’ actual injury can include the (1) purchase price plus interest and closing costs; (2) loss of the use of specific and unique property; and (3) loss of the appreciated value of the property. *Canady*, 107 N.C. App. at 261, 419 S.E.2d at 603. In the instant case, an award of \$11,000.00 to plaintiffs who have been deprived of the largest lot in a subdivision is not unfounded. The

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record discloses that the value of the lot was \$11,000.00. Furthermore, plaintiffs showed damages totaling approximately \$8,800.00, including an increase in money paid for a similar house, the interest rate differential for the purchase of the new house, and money paid to decrease points in interest. These damages could have been avoided, at least in part, if defendants had disclosed the change in lot size at the earliest possible moment instead of waiting. These damages occurred due to an unfair and deceptive trade practice, and the jury so found. Accordingly, this assignment of error is overruled.

[4] The third issue is whether the trial court erred when it awarded attorneys fees to plaintiffs in violation of N.C. Gen. Stat. § 75-16.1. Pursuant to N.C. Gen. Stat. § 75-16.1(1), the judge may, in his discretion, allow reasonable attorneys fees to the prevailing party upon a finding that “[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit” This statute is designed to supplement common law remedies that often prove ineffective to redress unfair or deceptive practices. *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981). In addition, an award of attorneys fees encourages private enforcement of the act. *Id.* at 549, 276 S.E.2d at 404. Further, damages assessed pursuant to Chapter 75 are automatically trebled. *Pinehurst, Inc. v. O'Leary Bros. Realty, Inc.*, 79 N.C. App. 51, 61, 338 S.E.2d 918, 924, *disc. review denied*, 316 N.C. 378, 342 S.E.2d 896 (1986). An award of treble damages achieves the same goals as an award of attorneys fees, but it also serves to deter future misconduct. *Marshall*, 302 N.C. at 546, 276 S.E.2d at 402.

Contrary to defendants' argument, there is ample evidence to support the finding that defendants' failure to settle the claim was unwarranted. The record in the case discloses more than a simple breach of contract. Indeed, the facts show intentional deception in dealing with plaintiffs. Defendants changed the plat to show the acreage of Lot 4 as 1.41 acres and recorded it without plaintiffs' knowledge after plaintiffs already signed an offer of purchase based on the representation the lot was 1.88 acres. Additionally, by defendants' own admission they chose not to go through with the deal due to an extremely small profit margin.

“Once the fact finder determines whether a party committed certain acts and whether those acts had a causal connection to the

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claimant's injury, the court as a matter of law may determine whether these acts do indeed constitute unfair and deceptive practices in violation of Chapter 75." *Southern Bldg. Maintenance, Inc. v. Osborne*, 127 N.C. App. 327, —, 489 S.E.2d 892, 897 (1997). In the instant case, the jury determined defendants' acts had a causal connection to plaintiffs' injuries. Further, the trial court made conclusions of law that defendants willfully committed the acts charged and that there was an unwarranted refusal to settle. Thus, these findings are sufficient to support the award under N.C. Gen. Stat. § 75-16.1. See *Garlock v. Henson*, 112 N.C. App. 243, 247, 435 S.E.2d 114, 116 (1993).

In conclusion, the trial court did not err when it did not grant defendants' motions for directed verdict for the breach of contract and unfair and deceptive trade practice claims. For the foregoing reasons, the decision of the trial court is

Affirmed.

Judges LEWIS and WALKER concur.

IN RE SARAH LYNN OWENS

No. COA97-519

(Filed 17 February 1998)

1. Contempt of Court § 17 (NCI4th)— news reporter—refusal to answer prosecutor's questions—assertion of privilege—hearing and findings not required

The trial court complied with the requirements of N.C.G.S. § 5A-14 in imposing criminal contempt sanctions against a news reporter after she clearly asserted the privilege argument, the trial court rejected the argument and instructed the reporter to answer the prosecutor's questions regarding an interview with the attorney of a murder suspect, and the reporter subsequently refused to answer the prosecutor's questions. Notice and a formal hearing were not required when the trial court promptly punished an act of contempt in its presence, and findings of fact and conclusions of law were not required since there was no factual determination for the trial court to make.

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2. Constitutional Law § 115 (NCI4th); Evidence and Witnesses § 2604 (NCI4th)—news reporter—testimony in criminal proceeding—no qualified privilege

A news reporter did not have a qualified privilege to refuse to testify in a criminal proceeding regarding nonconfidential information obtained from a nonconfidential source. A qualified privilege was not required by the First and Fourteenth Amendments to the U.S. Constitution, Article I, § 14 of the N.C. Constitution, or public policy.

Appeal by Sarah Lynn Owens from conviction of criminal contempt entered 7 February 1997 by Judge Robert L. Farmer in Wake County Superior Court. Heard in the Court of Appeals 27 October 1997.

Karen Boychuk was found dead on 31 December 1995. Her husband, William James Boychuk, reported to police that he and his wife had been struck by a vehicle on a Cary Parkway bridge. During the police investigation into his wife's death, Boychuk hired G. Bryan Collins to represent him. Boychuk was later indicted for the murder of his wife.

During a hearing in Wake County Superior Court, Assistant District Attorney R. Thomas Ford announced his intention to introduce into evidence comments made by Collins to the media which contradicted Boychuk's earlier account of the sequence of events. During several media interviews, Collins reported that Boychuk stated that after being hit by the car he went down the embankment looking for his wife and was knocked unconscious when he slipped and fell. Initially, Boychuk reported to the police that he was knocked unconscious after being hit by the car. The State asserted that the differing accounts of when Boychuk was knocked unconscious were admissible evidence of "consciousness of guilt." Boychuk filed a motion *in limine* requesting that the evidence be found inadmissible on grounds that it was irrelevant and deprived him of his right to counsel.

The State subpoenaed Sarah Lynn Owens, a television reporter, and two newspaper reporters to testify at the hearing on the motion *in limine*. A motion to quash the subpoena was filed on behalf of all three reporters, who asserted a qualified privilege under the First Amendment of the United States Constitution and Article I, § 14 of the North Carolina Constitution and a lack of relevant information

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due to uncertainty regarding Collins' authorization to speak for Boychuk.

After Owens was sworn in, the following dialogue ensued:

Mr. Ford: I take it you were a general reporter or reporter who goes out of the station to gather news?

Ms. Owens: Your Honor, I apologize. I respectfully decline to answer that question.

Mr. Ford: Well, I don't know how this lady could possibly have any privilege whatsoever in anybody's eyes about what kind of work she did at that time.

Court: You may answer the question. The Court directs you to answer the question.

Ms. Owens: I mentioned earlier I was a reporter.

Mr. Ford: Okay. Well, maybe I'm the one that's ignorant, but do all the reporters for TV stations go out and gather news, or do some of them, or is it just the anchor people that stay in the place?

Ms. Owens: Reporters gather the news.

Mr. Ford: Okay. Did you have occasion as pursuant to your employment to gather news by taking a statement from Mr. Collins in January of 1996?

Ms. Owens: Mr. Ford, I respectfully decline to answer the question.

Mr. Ford: Ma'am, you went on a TV news broadcast, did you not, in person, and aired footage from somewhere of Mr. Collins, did you not? Let me ask you this. Were you in the courtroom earlier when we played a clip of a video tape?

Ms. Owens: I decline to answer any more of the questions.

Mr. Ford: Well, Ms. Owens, are you telling me that you won't even answer the question of whether or not you interviewed this—or you broadcast news purporting to be an interview with Mr. Collins?

Ms. Owens: I will not answer any other questions.

Mr. Ford: Your Honor, I'm going to ask that this witness be instructed to answer my questions.

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Court: Answer the question asked to you by the Assistant District Attorney. If not, you'll be subject to contempt and possible jail sentence.

Ms. Owens: Your Honor, I apologize.

Court: Thirty days in jail. You're in the hands of the custody of the Sheriff. Take her away and lock her up.

At the conclusion of the hearing, the court denied the motion to exclude the statements made by Collins and also reduced Owens' jail sentence from thirty days to two hours, at which point she was released from jail. She subsequently filed a notice of appeal.

Attorney General Michael F. Easley, by Special Deputy Attorney General Norma S. Harrell, for the State.

Smith Helms Mulliss & Moore, L.L.P., by Jonathan E. Buchan, T. Jonathan Adams, and James G. Exum, for contemner; Sarah Lynn Owens.

Everett Gaskins Hancock & Stevens, L.L.P., by Hugh Stevens and C. Amanda Martin; and Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Wade H. Hargrove and Mark J. Prak, for amici curiae, The North Carolina Press Association, Inc., Gannett Newspapers, Inc., The Associated Press, Knight Publishing Company, Evening Post Publishing Co., Freedom Communications Inc., and The New York Times Co.

ARNOLD, Chief Judge.

At issue before this Court is the imposition of direct criminal contempt sanctions against a subpoenaed reporter who refused to testify regarding non-confidential information from a non-confidential source. As her first assignment of error, Owens argues that the trial court failed to give her an adequate opportunity to respond to the charges of contempt, found no facts supporting the imposition of a contempt sanction, and failed to indicate the burden of proof the court applied as required by N.C. Gen. Stat. § 5A-14(b) (1986). She also contends that the trial court erred in failing to recognize a news reporter's qualified privilege to refuse to testify.

[1] Addressing the argument that the trial court failed to allow Owens an opportunity to respond, we note that the official comments to N.C. Gen. Stat. § 5A-14 state that its provisions are not intended to

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require a hearing, or anything approaching a hearing. Instead, the requirements of the statute are meant to ensure that the individual has an opportunity to present reasons not to impose a sanction. We conclude that Owens did have such an opportunity.

After being subpoenaed, Owens filed a motion to quash and appeared through counsel and argued that her testimony was privileged. The trial court denied the motion. Prior to Owens' testimony, and in her presence, the trial judge also expressly told another testifying reporter who asserted the privilege that "I've already ruled twice that privilege does not exist for you all in these kinds of situations." Owens clearly was on notice that the trial court had considered the privilege claim and rejected it. Before holding her in contempt, the trial judge specifically warned Owens that her failure to answer questions would subject her to contempt sanctions. Her refusal to answer the prosecutor's questions was therefore a willful and deliberate act constituting direct contempt. *In re Williams*, 269 N.C. 68, 75, 152 S.E.2d 317, 323, cert. denied, 388 U.S. 918, 18 L. Ed. 2d 1362 (1967). The fact that Owens refused to testify because of her belief that the refusal was privileged is irrelevant. *Id.*

Owens contends that *O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E.2d 370 (1985), dictates that a hearing is required in order to comport with due process principles. We disagree with this interpretation of *O'Briant*. *O'Briant* requires that notice and a hearing be given only when a court does not act immediately to punish acts constituting direct contempt. *Id.* at 436, 329 S.E.2d at 373. Notice and a formal hearing are not required when the trial court promptly punishes acts of contempt in its presence.

Owens also argues that case law has interpreted the statute as requiring that the trial court make explicit findings of fact and conclusions of law that she was in contempt beyond a reasonable doubt. *State v. Verbal*, 41 N.C. App. 306, 254 S.E.2d 794 (1979). The purpose of this requirement, however, is to ensure that the judicial officer considered any excuse and found it inadequate. *Id.* at 307, 254 S.E.2d at 795. In this case, there was simply no factual determination for the trial court to make. It is clear that Owens asserted her privilege argument, that the trial court rejected such an argument and instructed her that she would be held in contempt for refusing to answer the prosecutor's question, and that she subsequently refused to answer any questions. Although she may have acted in good faith, there is no factual dispute that Owens willfully disobeyed the trial court's order.

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As the State correctly notes, an attorney late to court, as in *Verbal*, may have an explanation for being tardy. An explicit finding that the trial court considered and rejected such an excuse in *Verbal* was necessary for a determination of whether the contempt sanction was legally valid. In the instant case, Owens' justification for not complying with the trial court's order is clear from the record. We hold, therefore, that under these facts the requirements of the statute were met. *Cf. State v. White*, 85 N.C. App. 81, 85, 354 S.E.2d 324, 327 (1987), *affirmed*, 322 N.C. 506, 369 S.E.2d 813 (1988) (holding any error in trial court's failure to make required findings under N.C. Gen. Stat. § 15A-1064 when declaring a mistrial was harmless error because the grounds for the ruling were clear to the trial court and to the appellate court).

[2] The next question is whether the trial court erred in failing to recognize a news reporter's qualified privilege grounded in the First and Fourteenth Amendments to the United States Constitution and in Article 1, § 14 of the North Carolina Constitution. The seminal case on a reporter's testimonial privilege is *Branzburg v. Hayes*, 408 U.S. 665, 33 L. Ed. 2d 626 (1972), which addressed whether reporters have a special privilege to refuse to testify and reveal confidential sources to grand juries.

The Court began its analysis by noting a long line of cases stating that the First Amendment does not invalidate every burden on the press that may result from the application of rules or laws of general applicability. *Id.* at 682, 33 L. Ed. 2d at 640. After acknowledging that reporters had no privilege at common law, the Court declined to recognize either an absolute or qualified privilege for the press because, the Court reasoned, a fundamental function of government is to provide effective law enforcement to provide for the security of the person and property of the individual. *Id.* at 690, 33 L. Ed. 2d. at 644-45. Because of this important governmental interest, the Court found:

no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or *criminal trial*.

Id. at 690-91, 33 L. Ed. 2d at 645 (emphasis added).

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Owens contends that Justice Powell's concurrence, when read in conjunction with the dissent, establishes a majority view recognizing a reporter's qualified privilege and requiring a case by case balancing test. In order to overcome the privilege, she contends that the government must show that the requested information is highly relevant and necessary to its case and not obtainable from other available sources.

As evidence of an accepted qualified privilege, Owens cites portions of Justice Powell's concurrence calling for trial courts to strike a proper balance between the First Amendment and the obligation of all citizens to give relevant testimony regarding criminal conduct. *Branzburg*, 408 U.S. at 710, 33 L. Ed. 2d at 656 (Powell, J., concurring). As further support for her position, Owens points to Justice Powell's statement that state and federal authorities should not be allowed "to 'annex' the news media as 'an investigative arm of government.' " *Id.* at 709, 33 L. Ed. 2d at 656 (Powell, J., concurring). She concludes her argument by citing numerous cases supporting this interpretation and recognizing a qualified privilege for the press.

We reject this interpretation of *Branzburg*. The test Owens espouses today is a similar formulation of the qualified privilege argued by Justice Stewart in his dissent. *Branzburg*, 408 U.S. at 740, 33 L. Ed. 2d at 674-75 (Stewart, J., dissenting) (arguing for privilege that only can be overcome upon a showing that the information sought is relevant, the witness in question possesses the information, and the information is not available from an alternative source). The Court expressly rejected Justice Stewart's proposed balancing test and addressed the difficulties inherent in administering such a privilege. *Id.* at 703-04, 33 L. Ed. 2d at 653-54 (noting difficulties in determining who the privilege would cover and in placing trial courts in the unenviable position of having to weigh the value of different criminal laws in order to determine the proper balance with the First Amendment).

Owens is correct that many courts have recognized some form of a qualified privilege for the press. While these cases do recognize such a privilege, they overwhelmingly involve civil cases and often deal with reporters asked to divulge confidential sources or materials. In the case now before us, Owens was asked questions related to a criminal proceeding. The Supreme Court in *Branzburg* expressly recognized the state's compelling interest in pursuing criminal investigations. Furthermore, none of the information sought to be com-

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peled from her was of a confidential nature or from a confidential source. The State merely sought confirmation from Owens of statements made by Collins in a previously broadcasted interview.

Owens finally argues that there are important public policy considerations which weigh in favor of recognizing such a privilege. She argues that a growing number of reporters are subpoenaed each year and that this will eventually undermine the reporter's relationship with important sources. The Supreme Court considered and rejected these same arguments in *Branzburg*. Regarding the argument that failure to recognize a reporter's privilege would eventually serve to dry up sources and hamper the free flow of information, the Court stated:

[T]his is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.

Branzburg, 408 U.S. at 698-99, 33 L. Ed. 2d at 649. Regarding the claim that the number of subpoenas issued against the press has greatly multiplied, the Court stated that such an argument was "treacherous grounds" for fashioning such an expansive reading of the First Amendment that would have widespread implications for courts, grand juries, and prosecutors nationwide. *Id.* at 699, 33 L. Ed. 2d at 650.

In conclusion, we hold that the trial court complied with the requirements of G.S. § 5A-14 and properly declined to recognize a news reporter's qualified privilege to refuse to testify in a criminal proceeding regarding non-confidential information obtained from a non-confidential source.

Affirmed.

Judges McGEE and SMITH concur.

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[128 N.C. App. 585 (1998)]

JAMIE LEE PRUITT, MINOR, BY HIS GUARDIAN AD LITEM, PATRICIA CLIFTON PRUITT, AND PATRICIA CLIFTON PRUITT, INDIVIDUALLY, PLAINTIFFS v. DONALD POWERS, INDIVIDUALLY, LINDA POWERS, INDIVIDUALLY, DONALD POWERS AND LINDA POWERS D/B/A LINDA'S CHILD DAY CARE CENTER, DEFENDANTS

No. COA97-360

(Filed 17 February 1998)

1. Evidence and Witnesses § 2282 (NCI4th)— femur fracture—permanency of injury—expert testimony not too speculative

In an action in which minor plaintiff alleged negligent supervision and care by defendant day care center, a surgeon's testimony as to the permanency of plaintiff's injuries was not too speculative to be admitted into evidence where the surgeon testified that leg-length discrepancies "can often happen with a femur fracture" similar to the one plaintiff suffered and that "there is most likely a component of permanency to this [injury]" since the testimony set forth "probable" and not "possible" consequences.

2. Infants or Minors § 148 (NCI4th)— day care operators— injury to child—negligence

Plaintiff's evidence was sufficient for the jury on the issue of negligence by defendant day care operators in an action to recover damages for a fractured leg suffered by a three-year-old student when he was pushed by other boys in the class where the evidence tended to show that defendants had been notified by the classroom teacher of repeated pushing incidents; defendants admittedly knew of and appreciated the danger that, if the pushing incidents continued, the boys "were going to hurt someone"; and the owners merely reprimanded the boys and neither contacted the parents of the boys nor pursued more severe options at their disposal.

Appeal by defendants Donald Powers, Individually, Linda Powers, Individually, and Donald Powers and Linda Powers d/b/a Linda's Child Day Care Center, from judgment filed 4 September 1996 and from order filed 4 October 1996 by Judge Russell G. Walker, Jr. in Randolph County Superior Court. Heard in the Court of Appeals 7 January 1998.

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Baker & Boyan, P.L.L.C., by Walter W. Baker, Jr. and Jeffrey L. Mabe, for plaintiffs appellees.

Frazier, Frazier & Mahler, L.L.P., by Torin L. Fury, for defendants appellants.

GREENE, Judge.

Donald Powers and Linda Powers (Mrs. Powers), individually and doing business as Linda's Child Day Care Center (the Day Care) (collectively, Defendants), appeal from the entry of judgment on a jury verdict in favor of Jamie Lee Pruitt (Jamie) and his mother and guardian ad litem, Patricia Clifton Pruitt, (collectively, Plaintiffs) in the amount of \$116,380.85.

On 11 August 1993, three-year-old Jamie fractured the femur in his leg when he fell at the Day Care. Plaintiffs brought the following claims against Donald and Mrs. Powers as owners/operators of the Day Care:

8. . . . [Defendants] negligently failed to supervise and care for minor plaintiff
9. . . . [Defendants] were negligent in the following respects:
 - (a) Defendants . . . failed to ensure that a safe indoor environment was provided for the minor plaintiff violating 10 NCAC 30, Rule .0601(a) and N.C.G.S. § 110-85 and § 110-91.
 - (b) Defendants . . . failed to keep, exercise and maintain careful and proper supervision of minor plaintiff in violation of 10 NCAC 3U, Rule .0714(e) and thereby violated N.C.G.S. § 110-85.
 - (c) Defendants . . . failed to keep, exercise and maintain proper supervision of minor plaintiff in violation of the laws of the State of North Carolina.
 - (d) Defendants . . . failed to exercise the degree of care that a reasonable person of ordinary prudence would have exercised under the same or similar conditions then and there prevailing, in violation of and contrary to the laws of the State of North Carolina.

At trial, Jamie's classroom teacher testified that as the ten three- and four-year-old children in her class were lining up to go out to play, four of the boys (including Jamie) began pushing each other playfully. The teacher described the children as particularly "excited about getting to go outside" because the weather had been too bad

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for the previous two days to go outdoors. When the boys began pushing to get to the front of the line, the teacher told the children to stop pushing and separated the boys, placing Jamie near the middle of the line. As she continued to get the children ready to go outside, the boys again ran together and began pushing towards the door, at which point the teacher again separated the boys, placing Jamie near the front of the line of children, with the other three boys spaced out in the middle and back of the line. The boys immediately began pushing towards the door again as the teacher continued to try to get the children under control, and Jamie was pushed to the floor, fracturing his femur. The teacher testified that these four boys had pushed before, and that she had to "call them down . . . between four and five times a day . . . once a week or twice a week or so." The teacher had dealt with this problem "ten or more times." On the previous pushing occasions, the teacher testified that she had separated the boys from each other, and had "set them down and told them it wasn't nice to push, that they were going to hurt someone." The teacher had also talked to Mrs. Powers about her concerns that someone could get hurt due to the pushing "about a week or two before" Jamie's fall, and had asked Mrs. Powers to speak to the boys about it. After learning about the problem from the teacher, and before Jamie's fall, Mrs. Powers did place the boys in a "time out" circle to talk to them, and spoke to the boys about their "pushing and shoving."

The manual for the Day Care provided, in pertinent part, for the following disciplinary procedures:

When a child misbehaves, we will use our time out chair as a disciplinary action. The child will be required to sit quietly for 2 to 5 minutes. We will also take certain activities away from him for a short period of time. If for some reason this does not work with your child we will resort to calling either one or both parents at work to help us work out the problem. . . .

Children are going to be children and there will always be a certain amount of fighting, biting, and pulling hair among these children. At times this is hard to control, so parents! If we call you at work please understand that this is important or we would not be calling to disturb you on your job. We have had to do this in the past, so we know that this does work.

Mrs. Powers testified that she did not talk with the parents of the boys about the pushing incidents prior to Jamie's fall. Mrs. Powers had the authority to dismiss children from the Day Care for bad behavior, but did not feel the pushing incidents were severe enough

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to warrant dismissal. Another option would have been to separate the four boys into different classrooms. This option, however, would involve placing the boys either in a classroom with five-year-olds or in a classroom with two-year-olds, and therefore would require special permission from the State. Mrs. Powers further testified that placing children out of their age group was generally done only when "a child is ahead or behind in their academics." Mrs. Powers did not believe separating the boys into different classrooms was a viable solution for the pushing incidents.

Mark J. Warburton, M.D. (Dr. Warburton), an orthopedic surgeon who examined Jamie, testified during his deposition:

This particular type of injury, and in this case we have seen that the fracture has healed, but there is always a concern that there may be a leg-length discrepancy. By that I mean that one leg would be longer or shorter than the other. And this can often happen with a femur fracture in a child.

Unfortunately, we would have to wait until the child was fully mature, which would be for a male sixteen or seventeen years of age. So, therefore, we do feel that there is most likely a component of permanency to this. And I feel that the average percentage for an injury of this type in a child, at any rate, would be 15 percent.

Defendants objected at trial to the admission of this portion of Dr. Warburton's deposition testimony. The trial court overruled Defendants' objection and entered Dr. Warburton's entire deposition into evidence.

At the close of the evidence, Defendants made a motion for directed verdict. The trial court denied the motion for directed verdict as to Plaintiffs' ordinary negligence claim (at paragraph 9(d) of Plaintiffs' complaint), but allowed the directed verdict motion as to each of Plaintiffs' remaining claims because there was no evidence presented at trial to support a finding either that the supervising teacher in the classroom was negligent, or that statutory or administrative operating rules for day care centers had been violated. During the charge conference, Defendants objected to the judge's proposed jury instruction as to the permanency of Jamie's injuries. The court overruled this objection, and included the following in the jury charge:

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Damages [in relation] to Jamie Pruitt in this case would include damages for pain and suffering and for permanent injury. . . . An injury is permanent when any of its effects will continue through the plaintiff's life. These effects as I have said may include future pain and suffering that may be experienced by the plaintiff over his life expectancy.

The jury unanimously found that Jamie was "injured by the negligence of [Defendants]," and awarded Plaintiffs \$106,000.00 for Jamie's pain and suffering and permanent injury and \$10,380.85 for medical expenses. Defendants moved the court to order a judgment notwithstanding the verdict (JNOV) and, in the alternative, to order a new trial. Both motions were denied.

The issues are whether: (I) testimony as to the permanency of Jamie's injuries was too speculative to be admitted into evidence; and (II) sufficient evidence existed to deny Defendants' motions for directed verdict, JNOV, and a new trial.

I

[1] As a general rule, "a physician testifying as an expert to the consequences of a personal injury should be confined to certain consequences or probable consequences, and should not be permitted to testify as to possible consequences." *Fisher v. Rogers*, 251 N.C. 610, 614, 112 S.E.2d 76, 79 (1960). "Probable" is defined as "likely to happen," *American Heritage College Dictionary* 1090 (3d ed. 1993), and as "[h]aving more evidence for than against; . . . likely," *Black's Law Dictionary* 1201 (6th ed. 1990). By contrast, "possible" has been defined as "that [which] may or may not occur . . .," *Webster's Third New International Dictionary* 1771 (3d ed. 1968), and as "[c]apable of existing, happening, being, becoming or coming to pass; feasible . . .," *Black's Law Dictionary* 1166 (6th ed. 1990). Cf. *Largent v. Acuff*, 69 N.C. App. 439, 443, 317 S.E.2d 111, 113 (expert testimony that the consequences were "quite likely" properly admitted), *disc. review denied*, 312 N.C. 83, 321 S.E.2d 896 (1984); *Garland v. Shull*, 41 N.C. App. 143, 147, 254 S.E.2d 221, 223 (1979) (expert testimony that consequences "may" persist improperly admitted).

In this case, Dr. Warburton testified that leg-length discrepancy "can often happen with a femur fracture in a child," and that "there is most likely a component of permanency to this [injury]." The testimony of Dr. Warburton is in terms of the probable, not the possible,

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consequences to Jamie, and was therefore properly admitted into evidence. It follows that the jury instruction on permanent injury was also proper.

II

[2] We review the denial of Defendants' motions for directed verdict and JNOV to determine "whether there is substantial evidence that [Defendants'] negligence was the proximate cause of [Plaintiffs'] injuries." *Cobb v. Reitter*, 105 N.C. App. 218, 220, 412 S.E.2d 110, 111 (1992); *see also Colony Associates v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 637, 300 S.E.2d 37, 39 (1983) (a motion for JNOV is reviewed under the same standard as a motion for directed verdict). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In reviewing the relevant evidence, the trial court must "treat non-movant's evidence as true, considering the evidence in the light most favorable to non-movant and resolving all inconsistencies, contradictions and conflicts for non-movant, giving non-movant the benefit of all reasonable inferences drawn from the evidence." *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 177 (1990). Thus the trial court must deny motions for directed verdict and JNOV if there is such relevant evidence, when viewed in the light most favorable to Plaintiffs, as a reasonable mind might accept as adequate to support the elements of negligence. *Cobb*, 105 N.C. App. at 220-21, 412 S.E.2d at 111. Defendants' essentially argue that their actions did not, as a matter of law, constitute a breach of the requisite standard of care; we therefore address only whether substantial evidence existed that the appropriate standard of care was breached.

While North Carolina case law does not specifically address the duty owed by day care providers to the children under their supervision, our courts have held that the appropriate standard of care for a school teacher is that of a person of ordinary prudence under like circumstances. *Daniel v. City of Morganton*, 125 N.C. App. 47, 54, 479 S.E.2d 263, 268 (1997). By analogy, we believe that day care providers have "a duty to abide by that standard of care 'which a person of ordinary prudence, charged with his duties, would exercise under the same circumstances.'" *Izard v. Hickory City Schools Bd. of Education*, 68 N.C. App. 625, 626-27, 315 S.E.2d 756, 757-58 (1984) (quoting *Kiser v. Snyder*, 21 N.C. App. 708, 710, 205 S.E.2d 619, 621

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(1974)). “[T]he amount of care due a student increases with the student’s immaturity, inexperience, and relevant physical limitations.” *Payne v. N.C. Dept. of Human Resources*, 95 N.C. App. 309, 314, 382 S.E.2d 449, 452 (1989); cf. *Gurley v. St. Paul Fire & Marine Underwriters, Inc.*, 242 So. 2d 298 (La. App. 1970), cert. denied, 244 So. 2d 858 (La. 1971) (noting that although the standard of care owed to young children is only reasonable care, the reasonable care owed to young children entails more than the reasonable care owed to adults); *Fowler v. Seaton*, 394 P.2d 697 (Cal. 1964) (noting that preschool nurseries are primarily intended to provide supervision of very young children, and should therefore provide a higher degree of care than schools). Day care providers, however, cannot be expected “to anticipate the myriad of unexpected acts which occur daily in and about schools,” and are not insurers of the safety of the children in their care. See *Payne*, 95 N.C. App. at 313-14, 382 S.E.2d at 451. The “foreseeability of harm to pupils in the class or at the school is the test of the extent of the [day care provider’s] duty to safeguard her pupils from dangerous acts of fellow pupils” *James v. Board of Education*, 60 N.C. App. 642, 648, 300 S.E.2d 21, 24 (1983).

In this case, viewing the evidence in the light most favorable to Plaintiffs, substantial evidence of Defendants’ negligence existed to deny the motions for directed verdict and JNOV. Defendants had been notified by the classroom teacher of repeated pushing incidents. Defendants admittedly knew of and appreciated the danger that, if the pushing incidents continued, the boys “were going to hurt someone.” See *Daniel*, 125 N.C. App. at 55, 479 S.E.2d at 268 (requiring evidence that the defendant “knew of and appreciated” the danger to the plaintiff). The record reflects that Defendants neither contacted the parents of the boys, nor pursued the more severe options at their disposal. A reasonable mind might accept Defendants’ failure to take any action other than reprimanding the boys for their repeated pushing as adequate to support the conclusion that Defendants violated the standard of care owed to the children under their care.¹

Having determined that the trial court did not err in allowing Dr. Warburton’s testimony as to the permanence of Jamie’s injuries, and that Defendants’ motions for directed verdict and for JNOV were properly denied, we likewise hold that the trial court did not abuse its

1. We emphasize that our holding is based on the evidence of Defendants’ negligence, and is not based on any negligent conduct on the part of the teacher imputed to Defendants under the doctrine of *respondeat superior*. Indeed, our review of the record does not reveal any negligence on the part of the teacher.

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discretion in denying Defendants' motion for new trial. *See Corwin v. Dickey*, 91 N.C. App. 725, 729, 373 S.E.2d 149, 151 (1988) (reviewing denial of a motion for a new trial under an abuse of discretion standard), *disc. review denied*, 324 N.C. 112, 377 S.E.2d 231 (1989).

No error.

Judges MARTIN, Mark D., and SMITH concur.

STATE OF NORTH CAROLINA v. BILLY EUGENE CREECH, DEFENDANT

No. COA97-472

(Filed 17 February 1998)

1. Evidence and Witnesses § 1523 (NCI4th)— indecent liberties with children—admission of photographs of men in underwear—no error

The trial court did not err in a prosecution for taking indecent liberties with children in admitting photographs of male models and men in bikini underwear or g-strings where defendant contended that he was convicted because the jury viewed him as a homosexual after seeing the photographs, but defendant admitted at trial that he had homosexual encounters with men, other witnesses referred to defendant's homosexuality even before the photographs were introduced, and the photographs corroborated the testimony of other witnesses. N.C.G.S. § 8C-1, Rule 401.

2. Criminal Law § 120 (NCI4th Rev.)— discovery—testimony at trial—substance furnished before trial—no error

The trial court did not err in a prosecution for taking indecent liberties with children by admitting testimony which defendant contended was not revealed during discovery.

3. Evidence and Witnesses § 374 (NCI4th)— indecent liberties—other acts—admissible—common plan or scheme

The trial court did not err in a prosecution for indecent liberties by admitting testimony of incidents following the same pattern with the two boys who were the victims in this case. The testimony was sufficiently similar to show a common plan or scheme.

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4. Appeal and Error § 418 (NCI4th)— assignments of error—not raised in brief—abandoned

Questions raised by defendant's assignments of error but not presented in his brief were deemed abandoned.

5. Crime Against Nature § 10 (NCI4th)— indecent liberties—sexual element—evidence sufficient

The trial court did not err in a prosecution for taking indecent liberties by denying defendant's motion to dismiss for lack of evidence of the sexual element of the crime. The test of the sufficiency of the evidence is whether a reasonable inference of guilt can be drawn from the evidence presented; here, defendant and the child wore only underwear during massages and testimony concerning defendant's similar pattern of behavior during massages with other young males was evidence from which the jury could reasonably conclude that these acts with this child were committed to arouse defendant's sexual desire.

Appeal by defendant from judgments entered on 4 October 1996 by Judge Clifton W. Everett, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 12 January 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Margaret A. Force, for the State.

W. Gregory Duke, for defendant appellant.

SMITH, Judge.

Around Thanksgiving of 1995, Glen Brock ("Brock") arranged for his fifteen-year-old nephew (Child S) to give a massage to forty-seven-year-old defendant Billy Eugene Creech. Child S, who did not have any training or previous experience as a masseur, only knew defendant as his uncle's friend.

Defendant and Child S went to a back room at defendant's place of business. Defendant dimmed the lights and turned on music. Both defendant and Child S undressed down to their underwear. Defendant instructed Child S to lie down on a sofa bed, purportedly to show Child S how a massage should be administered.

Defendant massaged Child S and thereafter performed fellatio on Child S. Afterwards, Child S massaged defendant. Defendant paid Child S \$50.00 and gave Child S another \$20.00 to give Child S's uncle.

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Defendant asked Child S to send others who would give defendant a massage for money.

Brock also introduced defendant to another fifteen-year-old boy (Child R). Child R, also lacking experience or training as a masseur, gave defendant four or five massages between October and December 1995 following approximately the same routine as with Child S. Defendant took Child R to the same room in the back of his optician store. Defendant instructed Child R to strip down to his shorts, while defendant wore only his underwear. Defendant first massaged Child R to show him what to do, and then Child R massaged defendant. Defendant tried to turn on music, but Child R would not allow it. Afterwards, defendant paid Child R and drove him home. Defendant asked Child R whether he knew any other sixteen or seventeen year olds who wanted to earn extra money giving massages, and Child R replied that he did not.

Other witnesses, including Jody Tingen ("Tingen"), Wiley Jay Clark ("Clark"), and Patrick Burke ("Burke") testified about a pattern of behavior in which defendant sought out young males to give massages in the back of his store under similar circumstances, although these instances did not involve underage boys. Twenty-five-year-old Tingen, defendant's former hairdresser, testified that defendant asked him whether he knew any young males interested in giving defendant massages for money. Defendant told Tingen about a discreet room in the back of defendant's business for the massages. Defendant showed Tingen the room as a possible location for a hair salon, and additionally showed him photographs of male models and men in bikini underwear or g-strings.

Witness Clark testified he also met defendant through Brock. Defendant offered to pay Clark, who was seventeen years old at the time, for massages even though Clark had no previous experience or training. The same scenario occurred as during the incidents involving Child S and Child R. During Clark's second massage, defendant performed fellatio on Clark. Defendant asked Clark if he knew anyone else who would give him a massage, and he also showed Clark the pictures of a male stripper and skimpily dressed men.

Witness Burke, approximately twenty-six years old, testified that he met defendant one and one-half to two years earlier when Burke waited on defendant at Denny's restaurant. Defendant invited Burke to come down to defendant's shop after Burke mentioned he was looking for a day job. Once Burke arrived, defendant explained he

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wanted Burke to give him a massage. Defendant explained the normal routine and told Burke that defendant paid lots of money. Defendant told Burke they should both undress down to their underwear. Burke left without accepting the offer.

On 21 December 1995, the Greenville Police Department interviewed defendant. Defendant denied paying young boys to give him massages. Instead, defendant discussed a recent incident involving Brock and some missing jewelry from defendant's place of business. Defendant feared Brock was going to do something in retaliation because of defendant filing a police report concerning the jewelry. After the interview concerning the incidents with Child S and Child R, defendant spoke with another police officer and wondered "what if he didn't know they were underage?"

Thereafter, defendant denied the incidents with Child S and Child R, and further denied he performed fellatio on Child S. At trial, one of the five counts of taking indecent liberties with Child R was dismissed at the close of State's evidence. Thereafter, the jury found defendant guilty of four counts of taking indecent liberties with Child R, one count of taking indecent liberties with Child S, and one count of crime against nature with Child S. Defendant appeals.

[1] The first issue on appeal is whether the trial court violated N.C. Gen. Stat. § 8C-1, Rule 401 (1992) by allowing the State to introduce certain photographs into evidence. Rule 401 defines relevant evidence as " 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *State v. Rael*, 321 N.C. 528, 534, 364 S.E.2d 125, 129 (1988). However, relevant evidence may be excluded " 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' " *State v. Bishop*, 346 N.C. 365, 382, 488 S.E.2d 769, 778 (1997) (quoting N.C. Gen. Stat. § 8C-1, Rule 403 (1992)).

Since evidence favorable to the State is typically prejudicial to a defendant, the balancing test under Rule 403 involves a determination of whether that prejudice is unfair to a defendant. *Screaming Eagle Air, Ltd. v. Airport Comm. of Forsyth Co.*, 97 N.C. App. 30, 39, 387 S.E.2d 197, 203, *disc. review denied*, 326 N.C. 598, 393 S.E.2d 882 (1990). "Whether the use of photographic evidence is more probative than prejudicial . . . lies within the discretion of the trial court." *State*

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v. *Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). An abuse of discretion will be found only if the trial court's ruling is "manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993), *reh'g denied*, 510 U.S. 1066, 126 L. Ed. 2d 707 (1994).

Defendant argues that the trial court unfairly prejudiced him by admitting in evidence the photographs of male models and men in bikini underwear or g-strings. Defendant claims he was convicted because the jury viewed him as a homosexual after viewing the photographs. Defendant's claim is without merit because at trial defendant himself admitted he had sexual encounters with men. Additionally, other witnesses referred to defendant's homosexuality even before the photographs were introduced. More importantly, the photographs were admissible since they corroborated the testimony of Jody Tingen and Jay Clark. See *State v. Cummings*, 113 N.C. App. 368, 374, 438 S.E.2d 453, 457, *appeal dismissed and disc. review denied*, 336 N.C. 75, 445 S.E.2d 39 (1994). This Court has previously stated that "in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994). We find that the probative value of the evidence substantially outweighs the danger of unfair prejudice to defendant's case. Thus, defendant's assignment of error is overruled.

[2] The second issue is whether the trial court erred by admitting the testimony of Tingen. Defendant contends that Tingen's testimony should not have been admitted because Tingen's prior statements were not revealed during discovery. See N.C. Gen. Stat. § 15A-903 (1988). The trial court determined during voir dire that the substance of the statement was revealed and that the statement did not have to be given verbatim. The relevant statement provided to defense counsel on two occasions included that "[t]he defendant told him how boys could make money by giving him massages, asking to introduce him to young boys from East Carolina, that he was willing to pay a hundred dollars a pop." This statement explicitly refers to "boys" and gives adequate notice as required by N.C. Gen. Stat. § 15A-903 that defendant's statement to Tingen refers to young people. Our review of the record discloses that the statement was furnished in substance to defendant prior to trial. Therefore, this assignment of error is overruled.

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[3] The third issue is whether the trial court erred in allowing Jay Clark to testify. Defendant claims Clark's testimony was not relevant, and even if it was, that the evidence was unduly prejudicial. The general rule is that evidence of other crimes, wrongdoings, or acts is not admissible to prove conformity with a person's character. *Rael*, 321 N.C. at 534, 364 S.E.2d at 129. However, this type of evidence is admissible if it is relevant to any fact or issue other than the character of defendant. *Id.*

This Court has previously held that "evidence of prior sex acts may have some relevance to . . . defendant's guilt of the crime charged if it tends to show a relevant state of mind, such as intent, motive, plan, or opportunity." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). This Court must determine whether the evidence is sufficiently similar and not too remote in time so that it is more probative than prejudicial. *Id.*

In the instant case, the State argues that Clark's testimony was offered as proof of a common plan. Clark provided testimony of incidents following the same pattern as those taken with the two boys. This common pattern included: seeking young males, offering money to these males to give defendant massages, taking the males to a back room in defendant's store, inducing the males to wear only their underwear or shorts, defendant wearing only his underwear, the performance of massages and sometimes sexual acts, and seeking other young males to perform massages. "When similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan." *State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) (citation omitted). We conclude that the testimony was sufficiently similar to show a common plan or scheme. Thus, this assignment of error is overruled.

[4] Finally, defendant argues the trial court erred in denying the motion to dismiss at the close of all evidence concerning the one count of taking indecent liberties with Child S, the one count of crime against nature with Child S, and the remaining four counts of taking indecent liberties with Child R. Defendant's assignment of error covers both Child S and Child R. However, defendant's brief only refers to the fact that there is no evidence of a sexual act as to Child R. Questions raised by assignments of error which are not presented in a party's brief are deemed abandoned. *State v. Wilson*, 289 N.C. 531,

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535, 223 S.E.2d 311, 313 (1976). Thus, we will address this assignment of error only as it pertains to Child R.

[5] In considering a motion to dismiss at the close of all evidence, the trial court must view the evidence in the light most favorable to the State. *State v. Taylor*, 344 N.C. 31, 45, 473 S.E.2d 596, 604 (1996). The test of the sufficiency of the evidence is whether a reasonable inference of defendant's guilt can be drawn from the evidence presented. *State v. Gainey*, 343 N.C. 79, 85, 468 S.E.2d 227, 231 (1996). The Court must determine whether there is substantial evidence of each element of the crime charged. *State v. O'Rourke*, 114 N.C. App. 435, 441, 442 S.E.2d 137, 140 (1994). Substantial evidence includes relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Id.* The trial court is not required to determine that the evidence "excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991).

N.C. Gen. Stat. § 14-202.1 (1993) provides that a person is guilty of taking indecent liberties with a child under the age of sixteen if he either "(1) [w]illfully takes or attempts to take any immoral, improper, or indecent liberties . . . for the purpose of arousing or gratifying sexual desire; or (2) [w]illfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child . . ." However, "[a] broad variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor." *State v. Baker*, 333 N.C. 325, 329-30, 426 S.E.2d 73, 76, remanded, 109 N.C. App. 643, 428 S.E.2d 476, disc. review denied, 334 N.C. 435, 433 S.E.2d 180 (1993). The actual touching of a child by a perpetrator is not required. *State v. Turman*, 52 N.C. App. 376, 377, 278 S.E.2d 574, 575 (1981).

Defense counsel only objects to the lack of evidence as to the sexual element with regard to Child R. The crime of taking indecent liberties with a minor is a specific intent crime. *State v. Craven*, 312 N.C. 580, 584, 324 S.E.2d 599, 602 (1985). A specific intent crime requires the State to prove that defendant "acted willfully or with purpose in committing the offense." *State v. Eastman*, 113 N.C. App. 347, 353, 438 S.E.2d 460, 463 (1994). However, a defendant's purpose in committing the act in an indecent liberties case is "'seldom provable by direct evidence and must ordinarily be proven by inference.'" *State v. Jones*, 89 N.C. App. 584, 598, 367 S.E.2d 139, 147 (1988)

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(quoting *State v. Campbell*, 51 N.C. App. 418, 421, 276 S.E.2d 726, 729 (1981)).

Viewing the evidence in the light most favorable to the State, there is evidence from which the jury could find the existence of a sexual element as to Child R. Whether defendant's actions were "for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant's actions." *Rhodes*, 321 N.C. at 105, 361 S.E.2d at 580. During the massages, defendant wore only his underwear while Child R wore only his shorts. Furthermore, testimony concerning defendant's similar pattern of behavior during massages with other young males was evidence from which the jury could reasonably conclude that the acts with Child R were committed to arouse defendant's sexual desire. Thus, this assignment of error is overruled.

For the foregoing reasons, we find that defendant's trial was free from error.

No error.

Chief Judge ARNOLD and Judge MARTIN, John C., concur.

TERESA P. WILLIAMS, LINDA BARRIGER, GALE SHARPE, EDEE EARP, PAT LITTLE, JEAN REID, MARTHA CONRAD, GLEENIE SETZER, KAY WHITE, CAROLYN GILREATH, & THE NORTH CAROLINA ASSOCIATION OF EDUCATORS, PLAINTIFFS, v. ALEXANDER COUNTY BOARD OF EDUCATION, DEFENDANT

No. COA97-600

(Filed 17 February 1998)

Schools § 147 (NCI4th)—teachers—career development—programs changed—salary protection

The trial court erred by granting defendant's motion for summary judgment in a class action brought by teachers employed by defendant Alexander County who had obtained career status under the Career Development Pilot Program but who alleged that the Board failed to comply with the statutory mandate and pay the salary, bonus and supplements to which they were entitled when the General Assembly discontinued the CDPP and put into place a new career development program. The statutes without doubt enunciate the intent of the General Assembly to create

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statutory protection for teachers who qualified under the CDPP from any reduction in monthly salary caused solely by discontinuation of the original program.

Appeal by plaintiffs from order filed 3 March 1997 by Judge H. W. Zimmerman, Jr. in Alexander County Superior Court. Heard in the Court of Appeals 14 January 1998.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by John W. Gresham, for plaintiffs-appellants.

Joel C. Harbinson for defendant-appellee.

JOHN, Judge.

Plaintiffs appeal the trial court's grant of summary judgment in favor of defendant Alexander County Board of Education (the Board). We reverse the order of the trial court.

Pertinent facts and procedural information include the following: The Alexander County School System (the System) was one of sixteen public school systems selected in 1985 by the General Assembly to participate in the Career Development Pilot Program (CDPP). See N.C.G.S. §§ 115C-363 - 115C-363.11 (1991). Deeming it "essential to attract and retain the best people in teaching and in school administration," the General Assembly enacted the CDPP, expressing therein the policy of "provid[ing] an adequate base salary for and encourag[ing] differentiation of all teachers and school administrators." G.S. § 115C-363. To that end, teachers attaining "career level" status as defined in the section and who accepted duties for career status teachers were to earn additional pay and bonuses. G.S. § 115C-363.11. In the event the CDPP was subsequently discontinued, the statute provided that

any employee who has received a salary increment pursuant to the Career Development Plan shall continue to be paid the salary increment; however, the employee shall not receive any additional State annual increments, cost-of-living increments, or other salary increments unless the employee's salary would otherwise be less than the salary applicable to him on the State base salary schedule.

G.S. § 115C-363.11(c).

In 1989, the CDPP was in fact discontinued by the General Assembly, which established in its place a "site-based" permanent

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career development program under the “School Improvement and Accountability Act of 1989” (the Act). 1989 N.C. Sess. Laws ch. 778 (later codified in Chapter 115C of the General Statutes). The new program, denominated the “Performance-based Accountability Program,” shifted the implementation focus to individual schools and school districts and authorized the respective local school systems to develop their own differentiated pay plans, while retaining the option to continue use of the CDPP. *See* N.C.G.S. § 115C-238.4(a) (1991). During the 1990-91 school year, the System continued utilization of the CDPP.

Subsequent modifications of the Act dealt with the transitional period for counties moving from the original CDPP towards their own plan. Pertinent to the case *sub judice*, for example, 1989 Sess. Laws ch. 778, § 7, entitled “Existing Career Development and Lead Teacher Pilot Programs,” was amended to provide:

No provision of this section shall be construed to allow a local school administrative unit to pay any teacher, in salary and State-funded bonus or supplement, less than it paid that teacher on a monthly basis during the prior school year, so long as the teacher qualifies for a bonus or supplement under the local differentiated pay plan.

1989 N.C. Sess. Laws (Reg. Sess., 1990) ch. 1066, § 97(g) (“§ 97(g)”).

In 1992, the General Assembly again addressed incentive and bonus pay for educators in an enactment requiring that

[a]ll local school administrative units, including career ladder pilot units . . . adopt new differentiated pay plans for the 1993-94 school year, in accordance with the School Improvement and Accountability Act of 1989.

1991 N.C. Sess. Laws (Reg. Sess., 1992) ch. 900, § 71(d). Further,

[w]ith regard to the amount of State funds appropriated in subsequent fiscal years for local school administrative units that were career ladder pilot units, it is the intent of the General Assembly that any reductions in appropriations not result in teachers receiving less, in salary and State-funded bonus, than they received on a monthly basis during the prior fiscal year so long as the teachers qualify for bonuses under the local differentiated pay plan.

1991 Sess. Laws. (Reg. Sess., 1992) ch. 900, § 71(e) (“§ 71(e)”).

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Plaintiffs, currently or previously employed by the Board, initiated the instant suit as a class action “on behalf of all teachers who were employed by the Defendant in the school years 1990-91 through 1993-94 who had previously attained a ‘career status’ under the career development program.” Plaintiffs in the main alleged the Board

failed to comply with the statutory mandate, and in so doing, . . . failed to pay the individual plaintiffs and the members of the class the salary, bonus and supplements to which they were entitled.

Defendant Board’s subsequent summary judgment motion was granted in an order filed 3 March 1997. Plaintiffs timely appealed.

Summary judgment is properly entered when the pleadings, depositions, answers to interrogatories, admissions and affidavits demonstrate the absence of any genuine issue of material fact, and that the movant is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56 (1990); *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). The facts as alleged in the verified complaint are not in dispute, and the sole issue before us is interpretation of the law applicable thereto.

The Board contends the “hold harmless” provisions of G.S. § 115C-363.11(c) and § 71(e) do not independently guarantee the previously received level of income to teachers who qualified under the CDPP. In lieu of a formal brief, the Board has submitted and relies solely upon two documents purporting to interpret G.S. § 115C-363.11(c) and § 71(e) as not providing protection against reduction in monthly pay to educators who participated in the CDPP: (1) a written memorandum dated 25 March 1994 from Robert D. Boyd on behalf of the North Carolina School Boards Association (NCSBA) to Robert Austin, Superintendent of the System and (2) an advisory opinion dated 27 June 1994 from the Office of the Attorney General directed to the Superintendent of the System.

Preliminarily, we note that while opinions of the Attorney General are entitled to “respectful consideration,” such opinions are not compelling authority. *Hannah v. Commissioners*, 176 N.C. 395, 396, 97 S.E. 160, 161 (1918). In the current instance, moreover, neither the opinion of the Attorney General nor the NCSBA letter references § 97(g) and the applicability of these documents to our analysis is therefore limited.

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Indeed, critical to our decision is the relationship of § 97(g) to § 71(e), which replaced G.S. § 115C-363.11(c). Plaintiffs assert that the sections are to be construed *in pari materia* because § 97(g) and § 71(e) address the identical subject matter. We agree.

It is well settled that statutes dealing with the same subject matter must be construed *in pari materia*, “as together constituting one law.” *Williams v. Williams*, 299 N.C. 174, 180-81, 261 S.E.2d 849, 854 (1980). Both sections at issue herein concern continuation of incentive pay to teachers who qualified under the CDPP. It is therefore our duty to harmonize them so as to give effect to each. *Id.* at 181, 261 S.E.2d at 854.

Statutory interpretation presents a question of law. *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 528 (1994). The cardinal principle in the process is to ensure accomplishment of legislative intent. *Id.* To achieve this end, the court should consider “the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.” *Hayes v. Fowler*, 123 N.C. App. 400, 404-05, 473 S.E.2d 442, 445 (1996) (citation omitted). In ascertaining the intent of the legislature, the presumption is that it acted with full knowledge of prior and existing laws. *Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977).

We begin by considering the intent of the General Assembly in enacting the CDPP. The “obvious intent” of G.S. § 115C-363.11(c), as conceded in the Attorney General’s opinion relied upon by the Board, was

to provide an incentive to teachers to participate in this pilot program by assuring them that discontinuation of the pilot program would not result in the loss of the enhanced pay they had earned by achieving Career I or Career II status.

In each of the statutes passed subsequent to the CDPP, the intent of the General Assembly is readily discerned by examination of the unambiguous language contained therein. Section 97(g) provides a clear imperative:

No provision of this section shall be construed to allow a local school administrative unit to pay any teacher . . . less than it paid that teacher on a monthly basis during the prior school year, so long as the teacher qualifies . . .

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Section 71(e) likewise leaves no question as to the intent of the General Assembly with regard to local school administrative units previously designated as career ladder pilot units:

[I]t is the intent of the General Assembly that any reductions in appropriations not result in teachers receiving less . . . than they received on a monthly basis during the prior fiscal year so long as the teachers qualify

The statutes without doubt enunciate the intent of the General Assembly in enacting § 71(e) and § 97(g) to create statutory protection for teachers who qualified under the CDPP, “the best people in teaching and in school administration,” G.S. § 115C-363, from any reduction in monthly salary caused solely by discontinuation of the original 1985 program. As plaintiffs properly maintain, the statutory language is “unambiguous, direct, imperative and mandatory.” Accordingly, the trial court’s order in granting defendant Board’s motion for summary judgment was error and is therefore reversed.

Reversed.

Judges GREENE and MARTIN, Mark D., concur.

IN THE MATTER OF: THE APPEAL OF BOBBY J. ALLRED, A. LEONARD ALLRED, *ET AL.*, FROM THE DECISION OF THE RANDOLPH COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1995 AND 1996

No. COA97-78

(Filed 17 February 1998)

1. Taxation § 97 (NCI4th)—Property Tax Commission—not bound by N.C.G.S. § 105-287(b)

The Property Tax Commission was not bound by the restrictions of N.C.G.S. 105-287(b) in considering Randolph County’s appeal from the County Board of Equalization and Review’s order reducing a property tax appraisal. Under N.C.G.S. § 105-290(b)(3), the Commission has general supervisory power over the valuation and taxation of property throughout the State and authority to correct improper assessments and no legislative intent to limit the Commission’s appellate authority by the restrictions set out in N.C.G.S. 105-287(b) can be ascertained. Even assuming that the Commission was subject to N.C.G.S. § 105-287(b), there was no

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error because the Commission reduced the appraisals based on its finding that they resulted from an arbitrary and illegal valuation method, which is not excluded under N.C.G.S. § 105-287(b).

2. Taxation § 82 (NCI4th)—Property Tax Commission—valuation method—arbitrary—true value exceeded

The property owners (petitioners in an appeal to the Property Tax Commission) sufficiently met their burden of producing competent, material and substantial evidence to show that respondent (Randolph County) used an arbitrary and illegal valuation method in appraising their property and adequately rebutted the presumption of correctness in that the assessments exceeded the true value of the property by \$388,840.

Appeal by respondent from order entered 15 October 1996 by the Property Tax Commission, sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 17 September 1997.

Keziah, Gates & Samet, L.L.P., by Steven H. Bouldin and Andrew S. Lasine, for petitioners-appellees.

Gavin, Cox, Pugh and Gavin, by Alan V. Pugh and Richard L. Cox, for respondent-appellant.

TIMMONS-GOODSON, Judge.

Randolph County (hereinafter “respondent”) appeals from a final order of the Property Tax Commission (hereinafter “the Commission”), sitting as the State Board of Equalization and Review, which reduced the 1995 and 1996 ad valorem tax appraisals of property owned by Bobby J. Allred, A. Leonard Allred, Carl L. Allred and Evelyn Allred Ward (hereinafter “petitioners”). Petitioners purchased an industrial building and tract of land located in Randolph County, North Carolina, from Gai-Tronics Corporation for \$1,200,000.00 on 10 November 1993. Gai-Tronics had purchased the property in December of 1992 from a competitor, Gulton Industries, for \$1,775,000.00. The property in question is divided into two parcels for tax purposes, and only one parcel, Parcel No. 6798-29-9947, is the subject of this appeal. By stipulation of the parties, the other parcel has a true value of \$101,790.00.

On 1 January 1993, following its octennial general reappraisal, respondent appraised petitioners’ property for ad valorem tax purposes at a value of \$1,825,790.00. The property received the same val-

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uation on 1 January 1994. Neither assessment was appealed. However, on 1 January 1995, respondent increased its assessment of petitioners' property to \$1,838,840.00. This increase was based on a new addition to the building and a clerical error omitting a portion of the acreage. Petitioners appealed this assessment to the County Board of Equalization and Review in 1995, and again in 1996. The Board denied both appeals pursuant to North Carolina General Statutes section 105-287. Specifically, the Board found that the 1995 appraisal was not confounded by any clerical or mathematical errors or misapplications of the schedules, standards, or rules. Petitioners appealed the Board's decisions to the Commission.

At the hearing before the Commission, petitioners presented the expert testimony of Ronald D. Crowder, who, utilizing the income, comparable sales and replacement cost valuations methods, opined that the true value of both parcels combined was \$1,450,000.00. Mr. Crowder also testified about the unique circumstances involved in the 1992 sale between Gulton Industries and Gai-Tronics. Respondent countered Mr. Crowder's testimony with that of Marcus D. Frick, respondent's commercial and industrial appraiser. Mr. Frick explained the valuation method adopted and used by respondent in assessing petitioners' property. According to Mr. Frick, respondent employed a replacement cost method modified for the local market and confirmed that this method was properly applied to petitioners' property.

At the close of the evidence, the Commission determined that respondent did not act arbitrarily as to the 1993 and 1994 tax assessments of petitioners' property but used an illegal and arbitrary valuation method in conducting the 1995 and 1996 valuations. Respondent appeals.

On appeal, respondent cites ten assignments of error, which are reduced to three arguments in respondent's brief. These arguments are that the Commission erred (1) in determining that it was not restricted by North Carolina General Statutes section 105-287 with respect to adjusting a tax assessment in a year in which no general reappraisal or horizontal adjustment was made; (2) in finding that the sale price received in a transaction made subsequent to a general reappraisal was a statutorily authorized basis for adjusting an appraisal; and (3) in finding that respondent used an arbitrary and illegal method of valuing petitioners' property in 1995 and 1996. We turn now to the merits of each argument.

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[1] First, respondent contends that the Commission was bound by the restrictions set forth in section 105-287(b)(2) of the General Statutes, which forbids a county tax assessor to alter a valuation in a non-reappraisal year on the basis of "inflation, deflation, or other economic changes affecting the county in general." N.C. Gen. Stat. § 105-287(b)(2) (1995). In a separate but related argument, respondent contends that the Commission transgressed its statutory authority by considering the 1993 sale from Gai-Tronics to petitioners in determining the validity of the assessments at issue in this case. Specifically, respondent maintains that any discrepancy between the contested assessments and the 1993 sale price reflected economic factors, such as inflation or deflation, which are specifically excluded by section 105-287(b). We disagree.

Judicial review of orders issued by the Commission is governed by section 105-345.2 of the General Statutes. *In re Appeal of Duke Power Co.*, 82 N.C. App. 492, 499, 347 S.E.2d 54, 59 (1986) (citing *In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981)), *disc. review denied*, 318 N.C. 694, 351 S.E.2d 744 (1987). In pertinent part, subsection (b) of section 105-345.2 provides that this Court may affirm, reverse, declare null and void, remand, or modify the decision of the Commission, where

the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

...

(2) In excess of statutory authority or jurisdiction of the Commission[.]

N.C. Gen. Stat. § 105-345.2(b) (1995). In making the above determination, this Court "shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error." N.C. Gen. Stat. § 105-345.2(c) (1995). However, this Court is bound by the Commission's findings if they are supported by competent, material and substantial evidence in view of the entire record submitted. *Brock v. Property Tax Comm.*, 290 N.C. 731, 228 S.E.2d 254 (1976).

The authority of the Commission to entertain appeals from decisions of the County Board of Equalization and Review concerning property assessments is granted by section 105-290 of the General Statutes. See N.C. Gen. Stat. § 105-290(a),(b) (1995). Pursuant to this

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authority, the Commission shall make findings of fact and conclusions of law based on the evidence offered by both parties and shall “enter an order (incorporating the findings and conclusions) reducing, increasing, or confirming the valuation or valuations appealed[.]” N.C.G.S. § 105-290(b)(3). Thus, the Commission has “general supervisory power over the valuation and taxation of property throughout the State and authority to correct improper assessments.” *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972) (citing N.C. Gen. Stat. § 105-275). Inasmuch as we ascertain no legislative intent to limit the Commission’s appellate authority by the restrictions set out in section 105-287(b), we decline to adopt respondent’s first argument.

Assuming *arguendo* that the Commission was subject to the provisions of section 105-287(b), no error has occurred. The Commission reduced the 1995 and 1996 appraisals based on its finding that they resulted from an arbitrary and illegal valuation method, which is not excluded under section 105-287(b). “An illegal appraisal method is one which will not result in ‘true value’ as that term is used in [the Machinery Act.]” *In re Southern Railway*, 313 N.C. 177, 181, 328 S.E.2d 235, 239 (1985); *In re Colonial Pipeline Company*, 318 N.C. 224, 236, 347 S.E.2d 382, 389 (1986). Section 105-317(a) of the General Statutes states:

Whenever any real property is appraised it shall be the duty of the persons making appraisals:

. . .

- (2) In determining the true value of a building or other improvement, to consider at least its location; type of construction; age; replacement cost; cost; adaptability for residence, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value.

N.C. Gen. Stat. § 105-317(a) (1997). Thus, a multitude of factors may be considered in determining the “true value” of property.

In the case *sub judice*, petitioners presented evidence showing that the 1992 sale between Gulton Industries and Gai-Tronics was not an arms-length deal, but a buyout by one competitor of another’s business. As such, the transaction was heavily influenced by income tax considerations and included the sale of inventory, goodwill, and patents. At trial, respondent’s expert conceded that these circumstances would affect the accuracy of the sale price as an indicator of the property’s fair market value. Furthermore, petitioners introduced

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additional evidence indicating that unlike the 1992 competitor transaction, the 1993 sale between Gai-Tronics and petitioners was an arms-length deal that more accurately represented the true market value of the property. Still, respondent's assessor relied on the former sale in calculating the 1995 and 1996 appraisal of petitioners' property. Accordingly, the Commission found, in pertinent part, that:

1. The Randolph County Tax Assessor correctly followed the Schedule of Values, Rules and Standards and did not act arbitrarily as to the tax assessments for the subject property for the years 1993 and 1994, in that no evidence was presented to the Tax Assessor during those years that the assessments did not reflect the true value of the property.
2. The Tax Assessor was arbitrary in the tax assessments of the subject property for the years 1995 and 1996 for (a) failing to consider the November 1993 sale to the Taxpayers from the previous owner, [and] (b) failing to consider proper comparable sales to determine the true value of the subject property[.]

Since the Commission considered the 1993 sale for the purpose of evaluating the correctness of respondent's assessment method, such consideration was proper. We, then, reject respondent's second argument.

[2] Finally, respondent argues that the Commission erred in concluding that petitioners brought forth competent, material, and substantial evidence to show that respondent used an arbitrary and illegal valuation method in appraising their property. Again, we disagree.

To be sure, it is "a sound and a fundamental principle of law in this State that *ad valorem* tax assessments are presumed to be correct." *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975) (citations omitted). "As a result of this presumption, when such assessments are attacked or challenged, the burden of proof is on the taxpayer to show that the assessment was erroneous." *Id.* at 562, 215 S.E.2d at 762 (citations omitted). Specifically, the taxpayer must produce evidence showing that:

- (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property.

Id. at 563, 215 S.E.2d at 762.

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As previously addressed, petitioners produced plenary evidence to show that respondent's assessor improperly relied on the 1992 competitor sale and disregarded the 1993 arms-length sale in conducting the 1995 and 1996 tax assessments of petitioners' property. Petitioners, likewise, presented evidence demonstrating that the assessor's use of the replacement cost method in appraising petitioners' property was unconventional and unreliable. In a recent case, this Court provided guidance as to the appropriateness of a particular valuation method under certain circumstances. We stated,

It is generally accepted that the income approach is the most reliable method in reaching the market value of investment property. The cost approach is better suited for valuing specialty property or newly developed property; when applied to other property, the cost approach receives more criticism than praise. For example, the cost approach's primary use is to establish a ceiling on valuation, rather than actual market value. It seems to be used most often when no other method will yield a realistic value. The modern appraisal practice is to use cost approach as a secondary approach "because cost may not effectively reflect market conditions."

In re Appeal of Belk-Broome Co., 119 N.C. App. 470, 474, 458 S.E.2d 921, 924 (1995), *aff'd*, 342 N.C. 890, 467 S.E.2d 242 (1996). Petitioner Robert Allred testified that he considered the property at issue to be investment property. Further, petitioners' expert testified that "[t]he subject property is the type of real estate more typically purchased by an investor." Thus, in view of the entire record, petitioners sufficiently met their burden of producing competent, material, and substantial evidence to show that respondent's assessor employed an arbitrary and illegal valuation method with regard to the 1995 and 1996 assessments. Moreover, since these assessments exceeded the true value of the property by approximately \$388,840.00, petitioners adequately rebutted the presumption of correctness. Again, respondent's argument fails.

For the foregoing reasons, we find no error and affirm the Commission's final order.

Affirm.

Judges GREENE and JOHN concur.

STATE v. SHOPE

[128 N.C. App. 611 (1998)]

STATE OF NORTH CAROLINA v. GARY LEONARD SHOPE, DEFENDANT

No. COA97-61

(Filed 17 February 1998)

1. Criminal Law § 444 (NCI4th Rev.)— prosecutor's argument—defendant's credibility—curative instructions

There was no abuse of discretion prejudicial to defendant in a manslaughter prosecution where the trial court did not intervene *ex mero moto* when the prosecution argued that defendant's own attorney doubted defendant's credibility. Assuming that these comments were beyond the scope of proper argument, the court's instructions that the jury were the sole judges of credibility remedies any error.

2. Homicide § 760 (NCI4th)— manslaughter—Fair Sentencing Act—aggravating factor—heinous, atrocious or cruel

The trial court properly found as an aggravating factor when sentencing defendant for manslaughter that the killing of the victim was especially heinous, atrocious, or cruel where the evidence established excessive brutality and physical pain not usually present in a case of voluntary manslaughter. N.C.G.S. § 15A-1340.4(a)(1)(f).

3. Homicide § 760 (NCI4th)— voluntary manslaughter—Fair Sentencing Act—jealous rage—not mitigating circumstances

The trial court did not err in a manslaughter prosecution by rejecting defendant's claim that his relationship with the victim constituted an extenuating circumstance warranting mitigation of his sentence where he claimed his killing of the victim resulted from finding her in the arms of another man moments before the killing. N.C.G.S. § 15A-1340.4(a)(2)(i).

Appeal by defendant from judgment entered 28 June 1996 by Judge Claude S. Sitton in Graham County Superior Court. Heard in the Court of Appeals 8 October 1997.

Attorney General Michael F. Easley, by Assistant Attorney General K. D. Sturgis, for the State.

Appellate Defender Malcolm R. Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant-appellant.

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[128 N.C. App. 611 (1998)]

TIMMONS-GOODSON, Judge.

Defendant Gary Leonard Shope appeals from a judgment entered upon a jury verdict convicting him of voluntary manslaughter in the 5 September 1991 beating death of Lillian Turpin Porter (hereinafter "Porter"). At trial, the State presented the following evidence: In the weeks before her murder, Porter lived with defendant, her boyfriend of two years, at a campsite by Lake Santeelah in Graham County, North Carolina. On the afternoon of 5 September 1991, defendant returned to the campground after visiting with his nephew to find Porter at the neighboring campsite of Jeffrey Sanford and Lewis Griggs. She had been drinking, and she accused defendant of stealing her car. The couple argued heatedly for several minutes, but the argument eventually died down, and the couple remained at the Sanford-Griggs campsite, talking and drinking whisky. Later that evening, Griggs passed out, so defendant, Porter, and Sanford moved the party to the couple's campsite. Once again, defendant and Porter began to quarrel. However, when Sanford threatened to shoot defendant if he did not leave, defendant complied.

After defendant left, Porter told Sanford that defendant had been beating her for a week and showed him a wound on her shoulder that she claimed defendant had inflicted. Then, Sanford kissed Porter, and defendant witnessed this, having returned to the campsite without their knowledge. When Porter discovered defendant's presence, she insisted that Sanford go back to his campsite to check on Griggs. He did, and moments later, he heard Porter cry out, "God, don't kill me! You've got me killed now!" Porter continued to scream as Sanford ran back to the couple's campsite. When he reached the campsite, he found Porter lying face down in a pool of blood. Defendant was gone.

The police arrived at the campsite shortly after Sanford summoned help. At the scene, the investigating officers discovered a bloody tree branch, approximately three and one-half to four feet long, broken into three pieces and lying near Porter's body. In addition, they found a bloody towel, dentures, bone fragments, and teeth. Dr. William Selby, the pathologist who performed the autopsy on Porter's body, determined that she had suffered massive trauma to her face, neck, and head. Dr. Selby listed the cause of death as multiple blunt trauma to the head, but noted that suffocation could also have caused Porter's death, due to blood in her airway or swelling of her windpipe.

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Following an extensive search, the police located and arrested defendant on 10 September 1991. Defendant admitted that he struck Porter in the face and mouth with a stick and that he wiped off the blood with a towel. Defendant stated that he then grabbed two pints of liquor, some blankets, and Porter's purse and fled into the woods.

At trial, the jury found defendant guilty of voluntary manslaughter. During sentencing, the trial court found both aggravating and mitigating factors. The court, however, determined that the aggravating factors outweighed the mitigating factors and sentenced defendant to imprisonment for twenty years, a term exceeding the six-year presumptive sentence. Defendant appeals.

[1] Defendant first asserts that the trial court erred in failing to intervene *ex mero motu* to prohibit the prosecutor's repeated insinuations during closing argument that defendant's own attorney doubted the credibility of his testimony. Defendant contends that despite his failure to object at trial, the prosecutor's comments were so grossly improper that the court's lack of intervention resulted in a violation of defendant's due process rights under the United States and North Carolina Constitutions. We cannot agree.

"It is well settled that the arguments of counsel are left largely to the control and discretion of the trial judge and that counsel will be granted wide latitude in the argument of hotly contested cases." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (citations omitted). To that end, counsel are permitted to argue the evidence presented and all inferences reasonably drawn therefrom. *Id.* (citations omitted). "Even so, counsel may not, by argument . . . , place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence." *State v. Britt*, 288 N.C. 699, 711, 220 S.E.2d 283, 291 (1975) (citations omitted).

Defense counsel must object, and thereby, call the court's attention to any improper comments made by the prosecutor during his or her closing argument to the jury. *State v. Wilder*, 124 N.C. App. 136, 142, 476 S.E.2d 394, 399 (1996) (citing *State v. Sanders*, 327 N.C. 319, 342, 395 S.E.2d 412, 427 (1990), *cert. denied*, 498 U.S. 1051, 112 L. Ed. 2d 782 (1991)). Absent such an objection, our review is limited to a determination of whether, in light of all the circumstances, the prosecutor's argument was "so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct

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the error.' " *Id.* (quoting *State v. Allen*, 323 N.C. 208, 226, 372 S.E.2d 855, 865 (1988)). In any case, where the trial court's instructions to the jury cure the prosecutor's alleged improper arguments, the court's failure to correct the arguments *ex mero motu* will not constitute prejudicial error. *See id.*; *State v. Price*, 344 N.C. 583, 476 S.E.2d 317 (1996).

In the case before us, defendant takes issue with several statements made by the prosecutor during his closing argument. For instance, regarding an alibi offered by defense counsel in his closing, the prosecutor said,

[Defense counsel] is saying just don't believe anything [defendant] says, believe me, [defense counsel], when I stand up and testify as a witness telling you about Plan C.

Defendant also points to three additional remarks made by the prosecutor which suggested that defendant's attorney did not believe his testimony to be credible. Assuming, without deciding, that these comments were beyond the scope of proper argument, the trial court's instructions to the jury remedied any error potentially resulting from the comments. The court specifically advised the jury that they "[we]re the sole judges of the credibility of each witness" and that they were to "decide for [them]selves whether to believe the testimony of any witness." We are, therefore, satisfied that the jury was adequately instructed against looking to anyone but themselves in judging whether to believe defendant's testimony. Thus, as we discern no abuse of discretion resulting in prejudice to the defendant, this argument is overruled.

[2] Secondly, defendant contends that the trial court erred in finding as an aggravating sentencing factor that the offense was especially heinous, atrocious, or cruel under North Carolina General Statutes section 15A-1340.4(a)(1)(f). Defendant maintains that because Porter was intoxicated when she was killed and because she "could have died in as little as five minutes," the court's finding had no basis in law or fact. Again, we disagree.

Our Supreme Court, in *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983), set forth the standard for determining whether an offense is especially heinous, atrocious, or cruel under section 15A-1340.4(a)(1)(f) of the General Statutes. The Court held that, in cases decided under section 15A-1340.4(a)(1)(f), "the focus should be on whether the facts of the case disclose excessive brutality, or phys-

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ical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" *Id.* at 414, 306 S.E.2d at 786. Moreover, the Court stated that it "[did] not consider it inappropriate in any case to measure the brutality of the crime by the extent of the physical mutilation of the body of the deceased." *Id.* at 415, 306 S.E.2d at 787.

In the instant case, the evidence overwhelmingly showed that Porter endured a savage and merciless beating at the hands of defendant. Dr. Selby testified that Porter's skull was fractured in places too numerous to count; that her brain was bruised so severely that it bled into her spinal fluid; that both of her cheekbones were broken; that her nose was broken and almost completely severed from her face; that her jawbone was broken and exposed through torn facial tissue in the lower part of her mouth; and that her hyoid bone and larynx were broken, which indicated especially severe trauma. Dr. Selby opined that the injuries inflicted to Porter's face would have been very painful and that it could have taken anywhere between five and thirty minutes for her to die. He testified further that it seemed unlikely that Porter was knocked unconscious by the first blow, because the defensive wounds to her arms, hands, and fingers "reflect[ed] a fairly high level of consciousness" and confirmed that she fought to save her life.

Sanford's testimony also showed that Porter was conscious during the beating and that she was aware of her impending death. He stated that he heard Porter scream for several minutes and that she cried out, "God, don't kill me! You've got me killed now!" This evidence, viewed in the light most favorable to the State, establishes excessive brutality and physical pain not usually present in a case of voluntary manslaughter. Therefore, the court properly found that the offense was especially heinous, atrocious, or cruel. Defendant's argument, then, is unpersuasive.

[3] In his final argument, defendant alleges that the trial court erred in failing to find that his relationship with Porter was an extenuating circumstance warranting mitigation of his sentence. Defendant argues that because he found Porter in another man's arms "only moments before the killing," part of the blame for her death morally falls on her. We reject this argument, as it is wholly without merit.

The Fair Sentencing Act provides for a factor mitigating a defendant's sentence where, "the relationship between the defendant and the victim was . . . extenuating." N.C. Gen. Stat. § 15A-1340.4(a)(2)(i)

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(1988). This Court, however, has specifically interpreted this factor so as to exclude killings “motivated by jealousy or rage.” *State v. Puckett*, 66 N.C. App. 600, 606, 312 S.E.2d 207, 211 (1984). Indeed, we have held that “[t]he statute was meant to apply under ‘circumstances that morally shift part of the fault for a crime from the criminal to the victim’ but not ‘to make homicides of spouses or relatives . . . less deserving of punishment than those of others.’ ” *State v. Neville*, 108 N.C. App. 330, 333, 423 S.E.2d 496, 498 (1992) (quoting *State v. Martin*, 68 N.C. App. 272, 276, 314 S.E.2d 805, 807 (1984)).

In the case *sub judice*, defendant submits that in killing Porter, he acted out of jealousy. Still, he contends that the facts of this case compelled the court to find an extenuating circumstance, since defendant discovered Porter in the arms of another man “only moments before the killing.” Truly, defendant proposes a distinction without a difference, and we hold that the fatal beating in this case falls squarely within the “jealous rage” exclusion set forth in *Puckett*. Therefore, the trial court did not err in failing to find that defendant’s relationship with Porter was a mitigating factor.

We note that defendant asserted twelve additional assignments of error that he declined to bring forth in his brief. Hence, they are considered to be abandoned. N.C.R. App. P. 28(b)(5).

For the foregoing reasons, we hold that defendant received a fair trial, free of prejudicial error.

No error.

Judges GREENE and JOHN concur.

STATE OF NORTH CAROLINA v. WILLIAM SAMUEL TAYLOR

No. COA97-136

(Filed 17 February 1998)

Counties § 91 (NCI4th)—animal noise ordinance—not unconstitutionally vague—barking dogs—violation of ordinance

A county ordinance making it “unlawful for any person to own, keep, or have in the county an animal that habitually or repeatedly makes excessive noises that tend to annoy, disturb, or frighten its citizens” is not unconstitutionally vague or indefinite.

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Furthermore, the jury's verdict finding defendant guilty of violating the ordinance based on the barking of his hound dogs was not arbitrary or subjective.

Appeal by defendant from judgment entered 24 July 1996 by Judge William C. Griffin, Jr. in Martin County Superior Court. Heard in the Court of Appeals 23 October 1997.

*Attorney General Michael F. Easley, by Bart Njoku-Obi,
Associate Attorney General, for the State.*

E. Keen Lassiter, for defendant-appellant.

McGEE, Judge.

Defendant was charged with violating the Martin County Animal Control Ordinance, Section VI: Noisy Animals for the offense of Excessive Noises by Dogs in a misdemeanor criminal summons issued 22 December 1995.

Evidence presented at trial showed that from 1960 to 1995 defendant kept dogs on his property. However, it was not until 1991, when defendant started keeping walker hounds, that neighbors complained of excessive barking. Testimony showed that a particular trait of walker hounds is that the hounds tend to bark when they tree a raccoon and they do not stop barking until their owner arrives. In addition, they are bred to have a very loud bark that can be heard from great distances so that a hunter can track them.

On 5 September 1995, defendant's neighbor filed a complaint with a Martin County Animal Control Officer stating that the barking noises from defendant's dogs were keeping her up at night and disturbing her early in the morning. On 20 September 1995, defendant was issued a Notice of Warning for his barking dogs by the Martin County Animal Control Office. More complaints were filed by neighbors on 8 December 1995 and 15 December 1995. On 8 December 1995, defendant was issued a Notice of Violation and was subsequently charged with being in violation of the county animal control ordinance.

At trial, defendant's neighbors testified that the barking kept them up at all hours of the night, that they were restricted from opening their windows and doors during periods of warm weather, and that they lost countless hours of sleep. The barking was described as "relentless," "incessant," and lasting "24 hours a day almost." A jury

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found defendant guilty of violating the county animal control ordinance on 24 July 1996. Defendant was sentenced to imprisonment for one day, suspended for eighteen months; it was further ordered that the “[d]ogs be removed from their present location” Defendant appeals.

Defendant argues that the trial court erred in denying his motion to dismiss. He contends that the Martin County Animal Control Ordinance, Section VI: Noisy Animals is unconstitutional for vagueness, indefiniteness, and its lack of an objective standard to determine if the ordinance has been violated. We disagree.

North Carolina General Statute § 153A-121(a) (1991) grants counties the general power to enact ordinances, stating that “[a] county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances.” A county is given further power to regulate noises in N.C. Gen. Stat. § 153A-133 (1991) which allows a county to “regulate, restrict, or prohibit the production or emission of noises or . . . other sounds that tend to annoy, disturb, or frighten its citizens.” As with any power granted to a government entity, however, it is still necessary that in using its powers, the constitutional rights and guarantees of its citizens are not infringed upon.

The Martin County ordinance specifically reads: “It shall be unlawful for any person to own, keep, or have within the county an animal that habitually or repeatedly makes excessive noises that tend to annoy, disturb, or frighten its citizens.” Defendant argues that the ordinance, as written, is unconstitutionally vague and indefinite in that it is difficult to determine what constitutes excessive noise and when citizens are annoyed, disturbed, or frightened.

We readily acknowledge that “[n]oise ordinances present a great deal of problems in drafting and enforcing them because ‘[t]he nature of sound makes resort to broadly stated definitions and prohibitions not only common but difficult to avoid.’” *State v. Garren*, 117 N.C. App. 393, 395-96, 451 S.E.2d 315, 317 (1994) (*quoting People v. New York Trap Rock Corp.*, 442 N.E.2d 1222, 1226 (N.Y. 1982)). However, it is a basic rule of construction that “[a] statute or ordinance is presumed to have meaning and will be upheld if its meaning is ascertainable with reasonable certainty by proper construction. If a statute is susceptible to two interpretations, one constitutional and the other

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unconstitutional, the former will be adopted." *State v. Dorsett*, 3 N.C. App. 331, 335, 164 S.E.2d 607, 609 (1968) (citations omitted).

Martin County's Animal Control Ordinance contains general terms in describing prohibited conduct. However, these terms also have commonly accepted meanings and are sufficiently certain to inform persons of ordinary intelligence as to what constitutes a violation. *See Dorsett*, 3 N.C. App. at 336, 164 S.E.2d at 610. Even though words such as "habitual," "repeated," and "excessive" are abstract words, they have through their daily use become meaningful so that the average person should have a sense of what is prohibited. *Id.* at 335, 164 S.E.2d at 610. This Court has held similar ordinances to be constitutional in the past. In *Garren*, the Jackson County noise ordinance defined "loud, raucous and disturbing" noise as any sound which "annoys, disturbs, injures or endangers the comfort, health, peace or safety of reasonable persons of ordinary sensibilities." *Garren*, 117 N.C. App. at 394, 451 S.E.2d at 316. We held that the ordinance did "not reach more broadly than is reasonably necessary to protect legitimate state interests . . . [and] is not unconstitutionally overbroad or vague and is therefore valid." *Id.* at 397, 451 S.E.2d at 318-19. In *Dorsett*, the ordinance at issue was held to be valid despite the fact that it did not define in decibels the intensity of the noises that were prohibited. *Dorsett*, 3 N.C. App. at 336, 164 S.E.2d at 610. The Court held that "such exactness is not required." *Id.*; *see also State v. Winkelman*, 545 P.2d 601, 601 (Or. App. 1976) (statute that declared a dog that "[d]isturbs any person by frequent or prolonged noises" is a public nuisance held not to be unconstitutionally vague). Thus, despite the Martin County ordinance's use of general terms, we do not find it to be unconstitutionally vague or indefinite.

With regard to enforcement of the ordinance, defendant claims that it is difficult to determine what animal noises amount to being habitual, repeated, or excessive and that, therefore, it cannot be determined when a violation has occurred. Our Supreme Court has stated that in determining whether the terms of a criminal statute are sufficiently explicit to inform those who are subject to it what conduct on their part will render them "liable to its penalties," reasonable certainty is sufficient. *Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 211, 125 S.E.2d 764, 768 (1962). In *State v. Hales*, 256 N.C. 27, 34, 122 S.E.2d 768, 773 (1961) our Supreme Court held the provisions of the statute being reviewed were sufficiently definite to inform "a person of ordinary intelligence with reasonable precision what acts it . . . prohibit[s]." Furthermore,

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[a] criminal statute is not rendered unconstitutional by the fact that its application may be uncertain in exceptional cases, nor by the fact that the definition of the crime contains an element of degree as to which estimates might differ, or as to which a jury's estimate might differ from that of the defendant, so long as the general area of conduct against which the statute is directed is made plain. It is not violative of due process of law for a legislature in framing its criminal law to cast upon the public the duty of care and even of caution, provided there is sufficient warning to one bent on obedience that he comes near the proscribed area. Nor is it unfair to require that one who goes perilously close to an area of proscribed conduct take the risk that he may cross the line.

21 Am. Jur. 2d, *Criminal Law* § 17 (1981).

The terms in the Martin County Animal Control Ordinance—"habitually," "repeatedly," "excessive," "annoy," "disturb," or "frighten"—have common ordinary meanings by which to understand and measure the noise of a particular animal. An ordinance must be enforced based upon an objective standard; "therefore, there must be some evidence at trial based on this objective standard to support a conviction under [it]." *Garren*, 117 N.C. App. at 398, 451 S.E.2d at 319. It is reasonable to expect that the trial court would provide a valid and objective construction to such terms that, while general, also have a common meaning. *See Grayned v. City of Rockford*, 408 U.S. 104, 110, 33 L. Ed. 2d 222, 228 (1972); *see also Reeves v. McConn*, 631 F.2d 377, 386 (1980), *reh'g denied*, 638 F.2d 762 (5th Cir. 1981) ("in the expectation that a state court would interpret the [general] term objectively" the ordinance is not unconstitutionally vague or overbroad); *City of Marietta v. Grams*, 531 N.E.2d 1331, 1332 (Ohio App. 1987) ("ordinance could reasonably be construed to ban loud and continuous noise offensive to reasonable person of common sensibilities and thus was not unconstitutionally vague for failure to specify time for duration of clamor or noise it was intended to prohibit"); *State v. Friedman*, 697 A.2d 947, 950 (N.J. Super. Ct. App. Div. 1997) ("As numerous decisions regarding such ordinances make clear, such general language is permissible so long as courts utilize a reasonableness standard when applying it").

On several occasions between September and December 1995, defendant was given notice of the noise problems that his dogs were creating when his neighbors complained to the county. In addition, he

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was first given an official warning several months before any notice of violation was issued. In reviewing plenary evidence presented at trial of the habitual excessive noises caused by defendant's dogs and considering the common meanings of the words in the ordinance, the determination by the jury of a violation was not arbitrary or subjective.

The Martin County Animal Control Ordinance Section VI: Noisy Animals is not unconstitutional for vagueness or indefiniteness and the trial court was correct in denying defendant's motion to dismiss.

No Error.

Judges LEWIS and MARTIN, John C., concur.

JESSICA D. FENZ, A MINOR, BY HER GUARDIAN AD LITEM, JOHN B. GLADDEN, AND
SALLY A. FENZ, PLAINTIFFS V. JOHN R. DAVIS, DEFENDANT

No. COA97-461

(Filed 17 February 1998)

1. Appeal and Error § 209 (NCI4th)— notice of appeal—denial of new trial—underlying judgment not presented

A notice of appeal from an order denying a motion for a new trial which does not also specifically appeal the underlying judgment does not present the underlying judgment for review.

2. Trial § 555 (NCI4th)—damages—motion for new trial—juror affidavit—juror misconduct not shown

A juror's affidavit that damages awarded to the minor plaintiff for injuries received in an automobile accident were influenced by the fact that some jurors, including himself, were of the opinion that the minor plaintiff's parents were partly at fault for the severity of her injuries because the minor plaintiff was not in a child safety seat provides no basis for a new trial on the damages issue on grounds of juror misconduct, disregard by the jury of the court's instructions, or a damage award resulting from passion or prejudice since the affidavit does not disclose that any extraneous information about the parties or the case was brought to the attention of the jurors. N.C.G.S. § 8C-1, Rule 606(b).

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Appeal by plaintiffs from order entered 22 August 1996 by Judge John R. Parker in Dare County Superior Court. Heard in the Court of Appeals 4 December 1997.

Joynes Marcari, P.A., by Donald W. Marcari, for plaintiff-appellants.

Dunn, Dunn, Stoller & Pittman, L.L.P., by Andrew D. Jones, for defendant-appellee.

MARTIN, John C., Judge.

Plaintiffs filed this action to recover damages for injuries allegedly sustained by the minor plaintiff, Jessica Fenz, when the van in which she was a passenger was struck from the rear by a vehicle driven by defendant. Defendant admitted that he was negligent and the case proceeded to trial on the issue of damages before Judge Ragan at the 13 May 1996 civil session.

Briefly summarized, the evidence tended to show that Jessica, who was three years old at the time of the collision, was seated on the rear bench seat of the van with her two sisters; plaintiff Sally Fenz, her mother, was seated on the floor in front of the bench seat. None of the passengers in the rear of the van were restrained with seatbelts or child safety seats. Upon impact, Jessica's head was thrust forward and struck her mother's head. A CT scan and x-rays disclosed that Jessica had a bruise around her right eye, a small bruise to the frontal lobe of her brain, and a fracture of the bone above her right eye. She was hospitalized for observation for twenty-three hours. A neuropsychologist testified that Jessica had sustained permanent impairments in her frontal lobe functions. Plaintiff Sally Fenz testified that her daughter had required speech therapy and suffered from a variety of developmental and emotional difficulties, including loss of sleep, depression, and difficulty in school as a result of her injuries. It was stipulated that Jessica's medical bills totaled \$6,391.35.

The jury returned a verdict on 16 May 1996 awarding Sally Fenz \$6,391.35 for Jessica's medical expenses and awarding Jessica \$1,500.00 for her personal injuries. Judge Ragan entered a judgment upon the verdict on 30 May 1996. In apt time, plaintiffs moved for a new trial pursuant to G.S. § 1A-1, Rule 59. The motion was heard by Judge Parker at the 19 August 1996 civil session. Judge Parker denied the motion and plaintiffs appeal.

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I.

[1] The notice of appeal in this case reads as follows:

Plaintiff, Jessica D. Fenz, a minor by her Guardian ad litem, John B. Gladden, hereby gives notice of appeal to the Court of Appeals of North Carolina from the order entered in open court on August 19, 1996 in the Superior Court of Dare County, said order being signed by the Honorable J. Richard Parker on August 22, 1996, and filed with the Clerk of Court for Dare County on August 22, 1996, the court denying plaintiff's Rule 59 motion to set aside the verdict and grant a new trial.

N.C.R. App. P. 3(d) requires that the notice of appeal specify the party taking the appeal and designate the judgment or order from which the appeal is taken. A notice of appeal from an order denying a motion for a new trial which does not also specifically appeal the underlying judgment does not present the underlying judgment for review. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (citing *Chapparel Supply v. Bell*, 76 N.C. App. 119, 331 S.E.2d 735 (1985)). "Without proper notice of appeal, this Court acquires no jurisdiction." *Brooks, Com'r of Labor v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984). The notice of appeal filed in this case did not give proper notice of appeal from the underlying judgment entered upon the jury verdict and gives this Court jurisdiction only to review the minor child's appeal of Judge Parker's order denying plaintiffs' motion for a new trial. *Von Ramm, supra*. To the extent the record on appeal purports to assign error to the trial proceedings and to appeal from the judgment entered upon the jury verdict, such appeal must be dismissed.

II.

With respect to the appeal from Judge Parker's order denying plaintiffs' Rule 59 motion for a new trial, we first note that notice of appeal was given on 12 September 1996, and the court reporter certified that the transcript was delivered to plaintiffs on 6 December 1996. N.C.R. App. P. 11 provides for settlement of the proposed record on appeal, or service thereof on the appellee, within thirty-five days after the reporter's certification of delivery. The proposed record in this case was served on appellee's counsel on 25 March 1997, one hundred and nine days after the reporter's certification. The record on appeal does not disclose that any extensions of time were granted by the trial court. The Rules of Appellate Procedure are

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mandatory and failure to comply with them subjects an appeal to dismissal. *Wiseman v. Wiseman*, 68 N.C. App. 252, 314 S.E.2d 566 (1984). The burden is upon the appellant to show that the proposed record has been served and settled in compliance with the rules. *McLeod v. Faust*, 92 N.C. App. 370, 374 S.E.2d 417 (1988). Nothing appears in the record before us to explain the delay in settling the record in this case. Nevertheless, in the exercise of our discretionary power under N.C.R. App. P. 2, we will consider the appeal.

Appellate review of an order of a trial court granting or denying a new trial pursuant to G.S. § 1A-1, Rule 59 is limited to the question of whether the record discloses a manifest abuse of discretion or that the ruling was clearly erroneous. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982); *Pinckney v. Van Damme*, 116 N.C. App. 139, 447 S.E.2d 825 (1994). “[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge’s ruling probably amounted to a substantial miscarriage of justice.” *Burgess v. Vestal*, 99 N.C. App. 545, 550, 393 S.E.2d 324, 327, *disc. review denied*, 327 N.C. 632, 399 S.E.2d 324 (1990) (quoting *Britt v. Allen*, 291 N.C. 630, 231 S.E.2d 607 (1977)).

[2] Plaintiffs’ motion alleged as grounds for relief jury misconduct, G.S. § 1A-1, Rule 59(a)(2); manifest disregard by the jury of the court’s instructions, G.S. § 1A-1, Rule 59(a)(5); and inadequate damages appearing to have been given under the influence of passion and prejudice, G.S. § 1A-1, Rule 59(a)(6). In support of the motion, plaintiffs offered the affidavit of a juror, who stated that some of the jurors, including himself, were of the opinion that the minor plaintiff’s parents were partly at fault for the severity of her injuries because the minor plaintiff was not in a child safety seat. The juror stated:

I considered all the evidence presented at the trial in determining the damage award in addition to my belief that the parent’s (sic) were contributorily negligent in the above stated manner and I believed that a smaller monetary award for the minor child than was sought by either the plaintiffs or the defendant was appropriate.

As a general rule, a juror may not testify as to any matter which occurred during the jury’s deliberation, or to the effect which anything may have had upon his mind or emotions, or that of any other juror, as influencing the verdict, or to the mental processes by which

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the juror determined to assent to or dissent from the verdict. N.C. Gen. Stat. § 8C-1, Rule 606(b). However, Rule 606(b) "permits testimony by a juror as to whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." *Pinckney* at 148, 447 S.E.2d at 831.

[E]xtraneous information is information dealing with the [parties] or the case which is being tried, which information reaches a juror without being introduced in evidence. It does not include information which a juror has gained in his experience which does not deal with the [parties] or the case being tried.

State v. Rosier, 322 N.C. 826, 832, 370 S.E.2d 359, 363 (1988).

The juror's affidavit in this case does not disclose that any extraneous information about the parties or the case was brought to the attention of the jurors. Information concerning the manner in which the child and her mother were seated in the van was put in evidence by plaintiffs; the effect of that evidence upon the minds, emotions, or mental processes of the jurors, based on their life experiences, is not a proper subject for juror testimony under G.S. § 8C-1, Rule 606(b). See *Berrier v. Thrift*, 107 N.C. App. 356, 420 S.E.2d 206 (1992), *disc. review denied*, 333 N.C. 254, 424 S.E.2d 918 (1993). Therefore, the juror affidavit provides no basis for a showing of juror misconduct, that the jury disregarded any instructions of the court, or that the damage award was the result of passion or prejudice.

Moreover, it does not appear the jury misunderstood the court's instructions; the award for compensatory damages for medical expenses incurred by Sally Fenz for treatment of the minor plaintiff's injuries was precisely the amount to which the parties had stipulated. Finally, we reject plaintiff's contention that the damages were so clearly inadequate as to have been the product of bias, prejudice, or compromise. Although plaintiff's neuropsychologist opined that the effects of the injury were permanent, his testimony was vigorously cross-examined and he acknowledged that he had seen her only twice and that some of the indicia of permanent injury present upon his first examination had disappeared by the time of the second examination. The jury was free to accept or reject plaintiff's evidence regarding the severity or permanency of Jessica's injuries. See *Smith v. Beasley*, 298 N.C. 798, 259 S.E.2d 907 (1979).

In summary, we hold plaintiff has not carried her heavy burden of showing a manifest abuse of discretion on Judge Parker's part in his

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refusal to grant a new trial on the issue of damages in this case. His order denying plaintiffs' Rule 59 motion is affirmed.

Dismissed in part; affirmed in part.

Judges JOHN and SMITH concur.

STATE OF NORTH CAROLINA v. DANIEL JUNIOR JACKSON

No. COA97-556

(Filed 17 February 1998)

1. Criminal Law § 264 (NCI4th Rev.)—counterfeit controlled substance—discharge of attorney—continuance denied

In a prosecution for the sale and delivery of a counterfeit controlled substance, the trial court did not err in denying defendant's motion for a continuance after he discharged his attorney and was granted the right to proceed *pro se* where defendant only asked for "two hours or something" to prepare for trial and the record revealed that defendant had one and one-half hours during the lunch recess and an overnight recess to prepare his case.

2. Indigent Persons § 18 (NCI4th)—waiver of counsel—conviction of substantive offenses—reappointment for habitual felon charge—good cause not shown

A defendant who discharged his counsel and was granted the right to proceed *pro se* failed to show "good cause" for the reappointment of counsel to represent him on an habitual felon charge after the jury returned a verdict on the underlying substantive offenses.

3. Criminal Law § 1309 (NCI4th Rev.)—habitual felon—no-contest plea—felony conviction

A final judgment entered pursuant to a no contest plea after 1 July 1975 constitutes a "conviction" for purposes of the habitual felon statute. N.C.G.S. § 14-7.1.

Appeal by defendant from judgment dated 31 October 1996 by Judge A. Leon Stanback, Jr. in Durham County Superior Court. Heard in the Court of Appeals 14 January 1998.

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Attorney General Michael F. Easley, by Assistant Attorney General Jill B. Hickey, for the State.

Mark E. Edwards, for the defendant appellant.

GREENE, Judge.

Daniel Junior Jackson (defendant) appeals from a jury verdict finding him guilty of possession with intent to sell and deliver a counterfeit controlled substance, the sale and delivery of a counterfeit controlled substance, and of being a habitual felon.

The evidence in this case tends to show the following: On 12 December 1995, T.M. Taylor (Taylor), an undercover drug investigator for the Durham Police Department, was purchasing drugs from a man named Darryl Brown when another individual approached Taylor and offered to sell him drugs. This second individual was identified by Taylor as the defendant. Taylor asked the defendant to sell him ten dollars worth of either powder or rock cocaine. The defendant took the money and later returned with an item similarly shaped to rock cocaine. At the State Bureau of Investigation crime lab, the item tested negative for cocaine or any other controlled substance.

Just before the trial began on 30 October 1996, the defendant's counsel, Russell Hollers (Hollers), at the request of the defendant, filed a motion to withdraw from the case. In open court the defendant indicated to the trial court that "it would be appropriate for [Hollers] to resign from the case . . ." The defendant then requested permission to proceed *pro se*, and this request was granted after the trial court made certain inquiries of the defendant. The defendant requested a continuance of the case for "two hours, or something, just to review [certain] notes . . ." In denying the defendant's motion to continue, the trial court stated:

We're going on with this trial, and you will have—now, there will be times when you are calling for a jury and when we will take recesses, so you can use that time as you see fit, and we'll also be breaking for lunch. So you will have time in between these proceedings to review your notes.

After the jury was selected, the court recessed one hour and thirty minutes for lunch before the opening statements were presented. After the opening statements, the State presented its evidence and then the trial court recessed for the day. The next morning the State completed its case and the defendant presented his evidence.

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Following the jury's guilty verdict for the substantive charges, but before the beginning of the habitual felon stage of the trial, the defendant requested the trial court to reappoint him counsel. The trial court denied this request.

In the habitual felon phase of the trial, the State offered certified copies of the defendant's plea transcripts entered in three former convictions. One of the underlying convictions was based on a no contest plea entered in April 1987. The jury found the defendant guilty of being a habitual felon and the trial court sentenced the defendant to a minimum of 107 months and a maximum of 138 months of imprisonment.

In the record on appeal the defendant assigned error to “[t]he Court's denial of [his] motion for appointment of new counsel,” “[t]he Court's denial of [his] motion to continue to allow him to prepare,” “[t]he Court's denial of [his] motion for appointment of counsel for the habitual felony [sic] charge,” and “[t]he Court's failure to enter a judgment of non-suit on the charge of being a habitual felon on the basis that one of the prior convictions . . . was based on a plea of no contest.” In the defendant's brief to this Court he makes arguments in support of each of the above assignments of error, with the exception of his assignment relating to the “appointment of new counsel.” He does argue, in support of this assignment of error, that the trial court failed to comply with N.C. Gen. Stat. § 15A-1242 in allowing him to proceed *pro se*.

The issues are whether: (I) the trial court erred in denying the defendant's request for a continuance; (II) the defendant had a right to the reappointment of counsel in the habitual felon phase of the trial; and (III) a prior “no contest plea” can constitute a “conviction” within the meaning of N.C. Gen. Stat. § 14-7.1.

I

[1] Criminal defendants have a constitutional right to the assistance of counsel in conducting their defense. *State v. Lamb*, 103 N.C. App. 646, 647, 406 S.E.2d 654, 655 (1991) (quoting *State v. Gerald*, 304 N.C. 511, 516, 284 S.E.2d 312, 316 (1981)). Implicit in this right to counsel is the constitutional right to refuse the assistance of counsel and proceed *pro se*. *Id.* A denial of a motion to continue by a defendant proceeding *pro se*, who has just discharged his attorney, therefore implicates constitutional rights and is reversible error if the defendant shows that the denial of the motion was erroneous, unless the State

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demonstrates that the error was harmless beyond a reasonable doubt. *See State v. Beck*, 346 N.C. 750, 756, 487 S.E.2d 751, 755 (1997). Appellate review of a trial court's denial of such a motion to continue is reviewable *de novo* upon appeal. *Id.*

In this case, the defendant has failed to demonstrate that the denial of his motion to continue was error. The defendant only asked for "two hours, or something" to prepare for the trial. The record reveals that he had one and one-half hours during the lunch recess and an overnight recess to prepare his case.¹

II

[2] The defendant next argues that the trial court erred in not reappointing him counsel for the habitual felon hearing. We disagree. A waiver of counsel or decision to proceed *pro se* is "good and sufficient until the trial [is] finally terminated, 'unless the defendant himself makes known to the court that he desires to withdraw the waiver' " and makes a showing that the change of mind to proceed (with or without an attorney) was for some "good cause." *State v. Clark*, 33 N.C. App. 628, 630, 235 S.E.2d 884, 886 (1977) (quoting *State v. Smith*, 27 N.C. App. 379, 380-81, 219 S.E.2d 277, 279 (1975)). To hold otherwise would allow a defendant " 'to control the course of litigation and sidetrack the trial.' " *Id.*

In this case the defendant's request for the reappointment of counsel occurred after the jury returned a verdict on the underlying substantive offenses and before the hearing on the habitual felon charge. Because an adjudication on a habitual felon charge "is necessarily ancillary to a pending prosecution for the 'principal,' or substantive, felony," *State v. Allen*, 292 N.C. 431, 434, 233 S.E.2d 585, 587 (1977), the defendant's trial was not yet fully terminated within the meaning of *Clark*. Thus, the defendant had the burden of showing "good cause" for his request. He made no such showing.

III

[3] N.C. Gen. Stat. § 14-7.1 defines a habitual felon as "any person who has been convicted of or pled guilty to three felony offenses in

1. We do not intend to suggest that a defendant proceeding *pro se* can adequately prepare his own defense to a serious criminal charge in two hours nor do we intend to suggest that a defendant who decides to proceed *pro se*, after discharging his attorney, is entitled as a matter of law to any continuance. Each request for continuance must be considered on its own merits. We address here only whether the denial of this defendant's specific motion to continue was error.

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any federal court or state court in the United States or combination thereof" N.C.G.S. § 14-7.1 (1993). "[A] felony offense is defined as an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed." *Id.*

The question, therefore, is whether a no contest plea is a "conviction" within the meaning of section 14-7.1. Although the statute does not define "conviction" and there is no case law defining the term in the context of the habitual felon statute, our courts have consistently defined "conviction" in the context of other criminal statutes to include "no contest" pleas. *See State v. Outlaw*, 326 N.C. 467, 469, 390 S.E.2d 336, 338 (1990) (a no contest plea constitutes a conviction for impeachment purposes); *Davis v. Hiatt*, 326 N.C. 462, 465, 390 S.E.2d 338, 340 (1990) (no contest plea qualifies as a prior conviction for the purpose of revoking an individual's driver's license); *State v. Holden*, 321 N.C. 125, 162, 362 S.E.2d 513, 536 (1987), cert. denied, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988) (no contest plea can be used as aggravating factor for death penalty sentencing). Furthermore, legal dictionaries define "conviction" to include final judgments entered upon a "plea of *nolo contendere*." *Black's Law Dictionary* 333 (6th ed. 1990) Accordingly, we read "conviction" in the context of section 14-7.1 to include final judgments entered upon the entry of a no contest plea, provided the no contest plea was entered after 1 July 1975. *See State v. Petty*, 100 N.C. App. 465, 468, 397 S.E.2d 337, 340 (1990) (holding that conviction resulting from a no contest plea, entered prior to July 1975, could not be used to adjudicate habitual felon status under section 14-7.1); *see also Outlaw*, 326 N.C. 467, 469, 390 S.E.2d 336, 338 (N.C. Gen. Stat. § 15A-1022(c), effective on 1 July 1975, requires trial court, prior to entry of final judgment, to make a finding that there exists a factual basis for a no contest plea).

Finally, we do not address the defendant's argument, asserted in his brief, that the trial court failed to comply with section 15A-1242.² This argument is not supported by an assignment of error in the

2. N.C. Gen. Stat. § 15A-1242, among other things, requires the trial judge, prior to allowing a defendant to proceed "without the assistance of counsel," to be "satisfied that the defendant . . . [c]omprehends the nature of the charges and proceedings and the range of permissible punishments." The range of "permissible punishments" refers to the minimum and maximum punishments available as shown on the felony punishment and misdemeanor punishment charts in N.C. Gen. Stat. § 15A-1340.17 and N.C. Gen. Stat. § 15A-1340.23 respectively.

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record. N.C.R. App. P. 10; *State v. Thomas*, 332 N.C. 544, 554, 423 S.E.2d 75, 80 (1992).

No error.

Judges JOHN and MARTIN, Mark D., concur.

IN RE: BABY GIRL DOCKERY, A MINOR CHILD

No. COA97-359

(Filed 17 February 1998)

1. Adoption or Placement for Adoption § 30 (NCI4th)— illegitimate child—consent—by putative father—statute not gender discrimination—equal protection standard

The statute requiring the putative father of an illegitimate child to do one of the acts specified in the statute in order to establish a right to the requirement of his consent to adoption of the child, former N.C.G.S. § 48-6(a)(3), does not discriminate against similarly situated individuals on the basis of gender since the putative father has only a biological link to the child, and the mother has not only a biological link to the child but has also provided parental support for the child throughout the pregnancy and birth. Therefore, the constitutionality of the statute under the Equal Protection Clause should be decided under the standard of whether the distinction between the mother and putative father is rationally related to the achievement of a legitimate state interest.

2. Adoption or Placement for Adoption § 30 (NCI4th)— illegitimate child—consent by putative father—statute not violative of equal protection

The statute requiring the putative father of an illegitimate child to do one of the acts specified in the statute in order to establish a right to the requirement of his consent to adoption of the child provides a reasonable means of addressing the legitimate state concern that only those persons who have, in addition to a biological link, a parental relationship of care and provision for a minor child be afforded the right to the requirement of consent before his or her parental rights are severed by such child's

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adoption, and the statute thus does not violate the equal protection rights of the putative father. Former N.C.G.S. § 48-6(a)(3).

3. Adoption or Placement for Adoption § 30 (NCI4th)—illegitimate child—consent by putative father—statute not violative of due process

The statute requiring the putative father of an illegitimate child to do one of the acts specified in the statute in order to establish a right to the requirement of his consent to adoption of the child bears a rational relationship to a legitimate state goal and thus did not violate a putative father's right to substantive due process.

Appeal by respondent from order entered 17 January 1997 by Judge Steven J. Bryant in Cherokee County District Court. Heard in the Court of Appeals 30 October 1997.

Joseph M. Collins, P.A., by Joseph M. Collins, for petitioner-appellees.

Collins, Blomeley & Woody, PLLC, by James L. Blomeley, Jr., for respondent-appellant.

MARTIN, John C., Judge.

In early 1995, Jennifer Dockery and respondent Rick Barmore dated briefly and, in the course of that relationship, engaged in sexual relations, as a result of which Ms. Dockery became pregnant. After they ceased dating, they had no further communications and Ms. Dockery did not inform Mr. Barmore of her pregnancy. The minor child was born on 14 September 1995 in Sylva, Jackson County, North Carolina. Ms. Dockery had arranged for the child to be adopted and the child was placed with the adopting parents on 16 September 1995. Shortly thereafter, Mr. Barmore was contacted by the attorney representing the adopting parents and was requested to execute a document consenting to the child's adoption. Mr. Barmore declined to consent.

On 25 October 1995, the adopting parents filed this adoption proceeding in Macon County alleging, *inter alia*, that the consent of the child's father was not required because he had not acknowledged paternity, had not legitimated the child in accordance with G.S. § 49-10, and had not provided financial support or consistent care with respect to the child and mother. On 31 October 1995, Mr.

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Barmore, unaware of the pending adoption proceeding, filed an action in Cherokee County seeking to establish his paternity of the child and requesting custody.

On 7 November 1995, Mr. Barmore moved to intervene in this proceeding and to consolidate it with the Cherokee County action. The record does not reflect that any action was taken on the motion to consolidate. On 14 May 1996, Judge Bryant, acting in the Cherokee County action, entered a judgment declaring Mr. Barmore the biological father of the minor child.

On 17 January 1997, Judge Bryant entered an order in this proceeding in which he incorporated the findings and conclusions contained in the Cherokee County judgment and further found, upon stipulated facts, that at the time the adoption proceeding was filed Mr. Barmore had neither acknowledged paternity of the child by affidavit nor established paternity judicially, had not filed a petition for legitimization of the child in accordance with G.S. § 49-10, and had not provided consistent care or financial support to the child and mother. Judge Bryant concluded that Mr. Barmore was not entitled to intervene in the adoption proceeding, that his consent to adoption was not required, and that further proceedings in the Cherokee County action were moot. Mr. Barmore's motion to intervene in the adoption proceeding was denied and the Cherokee County legitimization and custody action was dismissed. Mr. Barmore gave notice of appeal. The trial court stayed further proceedings in the adoption proceeding pending resolution of the appeal.

[1],[2] The argument in support of respondent-appellant's assignments of error raises the single issue of whether former G.S. § 48-6(a)(3), applicable to this case¹, violates his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. The provisions of G.S. § 48-6(a) pertinent to this case are:

(3) In the case of a child born out of wedlock the consent of the putative father shall not be required unless prior to the filing of the adoption petition:

1. Chapter 48 of the general Statutes was revised by Session Laws 1995, c 457, effective 1 July 1996. Adoption proceedings filed prior to and still pending on 1 July 1996 are governed by Chapter 48 as in effect immediately prior to that date. Session Law 1995, c 457, s 12. G.S. § 48-3-601 defines those persons whose consent is required in adoption proceedings filed on and after 1 July 1996.

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- (a) Paternity has been judicially established or acknowledged by affidavit . . . , or
- (b) The child has been legitimated either by marriage to the mother or in accordance with provisions of G.S. 49-10, a petition for legitimation has been filed; or
- (c) The putative father has provided substantial financial support or consistent care with respect to the child and the mother.

N.C. Gen. Stat. § 48-6(a)(3) (1984).

Respondent-appellant contends application of the statute results in an impermissible gender-based distinction between mothers of illegitimate children and fathers of illegitimate children because the requirement that the mother consent to adoption is not dependent upon her taking the steps required of the putative father by G.S. § 48-6(a)(3). In support of his argument, respondent-appellant relies upon the decision of the United States Supreme Court in *Caban v. Mohammed*, 441 U.S. 380, 60 L.Ed.2d 297 (1979). In *Caban*, the Court struck down, as impermissible gender-based discrimination, a New York statute which provided that the unwed mother of an illegitimate child could prevent the adoption of her child by withholding consent, but gave no similar right to the putative father. The putative father had provided care and support to the child, establishing not only the biological connection to the child, but also a parental relationship of care and support. The Court held, under such circumstances, that the mother and father were similarly situated individuals who were treated differently only because of their gender and that the state could not demonstrate that such disparate treatment was substantially related to the achievement of important governmental interests. *Id.*

Caban is distinguishable. First, respondent-appellant has provided no care or support to the child, though his failure to do so was admittedly unintentional and due to his lack of knowledge of the minor child's existence. More importantly, the statute in *Caban* provided no means by which the putative father could establish a right to the requirement of his consent to the adoption. The distinctions are critical. G.S. § 48-6(a)(3) provides a means by which a putative father may establish that right, i.e., by doing one of the acts specified in the statute. Until he does so, the father has only a biological link to the child, and, thus, is not similarly situated to the mother, who has not

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only a biological link to the child but has also provided parental care and support for the child throughout the pregnancy and birth. *See Lehr v. Robertson*, 463 U.S. 248, 260, 77 L.Ed.2d 614, 626 (1983) (“(p)arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.”). Upon doing one of the acts specified by the statute, the putative father can also establish his obligation of parental care and support, beyond the mere biological link to the child, and become similarly situated to the mother. He is then granted the same right to the requirement of his consent to adoption. Thus, we believe the statute actually provides a means of identifying persons who are similarly situated with respect to the child and gives them similar rights, rather than making simply a gender-based distinction. *See Lehr, supra*. Hence, we hold that G.S. § 48-6(a)(3) does not discriminate against similarly situated individuals on the basis of gender.

Because the statute does not distinguish between the rights of mothers and fathers of illegitimate children solely on the basis of gender, its constitutionality under the Equal Protection Clause should be analyzed under the standard of whether the distinction is rationally related to the achievement of a legitimate state interest. *U. S. R. R. Retirement Board v. Fritz*, 449 U.S. 166, 66 L.Ed.2d 368 (1980), *reh'g denied*, 450 U.S. 960, 67 L.E.2d 385; *State ex rel. Util. Comm'n v. Carolina Util. Cust. Ass'n*, 336 N.C. 657, 446 S.E.2d 332 (1994). We hold the statute provides a reasonable means of addressing the legitimate state concern that only those persons who have, in addition to a biological link, a parental relationship of care and provision for a minor child be afforded the right to the requirement of consent before his or her parental rights are severed by such child's adoption.

[3] Respondent-appellant also contends that application of G.S. § 48-6(a)(3) to this case violates his rights to due process guaranteed by the Fourteenth Amendment. Although respondent-appellant does not clearly denote whether he contends his procedural due process rights or his substantive due process rights have been violated, he appears to argue a violation of substantive due process.

The first step in a substantive due process analysis is to determine what individual right is affected by a disputed statute. The nature of the right will determine how much constitutional protection it will be given and, accordingly, the level of scrutiny which should be applied to the legislation. The link between a parent and child is a fundamental right worthy of the highest degree of scrutiny, but, as we

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have already noted, a mere biological link alone is not equivalent to a meaningful parent-child relationship. *Lehr, supra*. In *Lehr*, the Court quoted with approval Justice Stewart's dissent in *Caban* to note that "the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children." *Lehr v. Robertson*, 463 U.S. 248, 260 n.16, 77 L.Ed.2d 614, 626 n.16 (1983) (quoting *Caban v. Mohammed*, 441 U.S. 380, 60 L.Ed.2d 297 (1979) (Stewart, J., dissenting)); *Michael H. v. Gerald D.*, 491 U.S. 110, 105 L.Ed.2d 91 (1989). The court went on to hold:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the due process clause. At that point, it may be said that he "act[s] as a father toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection (citations omitted).

Lehr, at 261, 77 L.Ed.2d at 626. Thus, respondent-appellant is not entitled to application of the heightened level of scrutiny in this case; rather the statute must only bear a rational relationship to a legitimate state goal. *Richardson v. N.C. Dept. of Correction*, 345 N.C. 128, 478 S.E.2d 501 (1996). Applying such an analysis here, we hold respondent-appellant's due process rights with respect to the minor child were not violated by North Carolina's statutory scheme for legitimization support or adoption of illegitimate children in place at the time.

Affirmed.

Judges JOHN and SMITH concur.

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[128 N.C. App. 637 (1998)]

JOY GWENN HINTON, PLAINTIFF V. OTIS LEE HINTON, DEFENDANT

No. COA97-601

(Filed 17 February 1998)

1. Divorce and Separation § 565 (NCI4th)— modification of Texas child support order—plaintiff in Texas—no consent to jurisdiction in N.C.

The trial court erred by modifying a Texas child support order where there is no dispute that the Texas courts had jurisdiction to enter the support order under a law substantially similar to Chapter 52C of the General Statutes, North Carolina's version of the Uniform Interstate Family Support Act; the trial court found that plaintiff is a citizen and resident of Texas, so that Texas courts have continuing, exclusive jurisdiction over the matter and a North Carolina court may not modify the order except as provided in N.C.G.S. § 52C-6-611; the first statutory exception does not apply because the individual obligee remains in Texas; and the second does not apply because there is nothing in the record to show that consent has been given for North Carolina to assume continuing, exclusive jurisdiction.

2. Divorce and Separation § 565 (NCI4th)— Texas child support order—modification—federal statute—no written consent

The trial court's modification of a Texas support order violated 28 USCA § 1738B, which requires consent in writing from all parties for another state to modify a child support order entered with jurisdiction, notice and an opportunity for hearing when the child or either party continues to reside in the state that originally issued the order.

Appeal by plaintiff from order entered 21 March 1997 by the Honorable J. Larry Senter in Franklin County District Court. Heard in the Court of Appeals 13 January 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Gerald K. Robbins, for plaintiff-appellant.

Jolly, Williamson & Williamson, by W. J. Williamson for defendant-appellee.

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WYNN, Judge.

The sole issue in this appeal is whether the North Carolina trial court erred by modifying a Texas order for child support. The obligee continues to reside in Texas. Under the Uniform Interstate Family Support Act ("UIFSA"), which both North Carolina and Texas have enacted, where an obligee remains in the state that originally issued a child support order, a court of another state may not modify the support order without the consent of all parties. As the record does not show that all parties have filed the written consent necessary to allow a North Carolina court to modify the original order, the trial court erred by modifying the child support order. We therefore vacate the modification order and remand.

In June of 1992, the district court in Bell County, Texas, granted a divorce to plaintiff Joy Gwenn Hinton and defendant Otis Lee Hinton. Custody of the two children went to Mrs. Hinton. The divorce decree set Mr. Hinton's child support obligation at \$800.00 per month, but the next year the support obligation was lowered to \$500.00 by the Texas court.

Mrs. Hinton remained in Texas with the children while Mr. Hinton moved to this state. In March of 1996, the child support order was registered in North Carolina. Following registration of the order, Mr. Hinton moved that the North Carolina trial court modify the amount of his child support order, based on the changed circumstance of one of his children joining the military.

On 29 January 1997 the trial court entered an order reducing the child support to \$250.00 per month. Mrs. Hinton moved for a new trial and for additional findings of fact. In response to the latter motion, the trial court found as fact that "the Plaintiff in this matter, Joy Gwenn Hinton, is a citizen and resident of the State of Texas." The trial court denied the motion for a new trial.

Plaintiff appeals.

[1] North Carolina's version of UIFSA is codified in Chapter 52C of the General Statutes. See N.C. Gen. Stat. §§ 52C-1-100 to 9-902 (1995 & Supp. 1997). The recent amendments to Chapter 52C, see N.C. Gen. Stat. § 52C-1-100 official cmt. (Supp. 1997), are not applicable to this case, and therefore this opinion refers to the pre-amendment sections of Chapter 52C. However, we note that the amendments did not substantively change the law upon which this opinion is based.

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N.C. Gen. Stat. § 52C-2-205(d) (1995) provides that “[a] tribunal of this State shall recognize the continuing, exclusive jurisdiction of a tribunal of another state which has issued a child support order pursuant to a law substantially similar to this Chapter.” The official comment to that section explains that:

This section is perhaps the most crucial provision in UIFSA. . . . [T]he issuing tribunal retains continuing, exclusive jurisdiction over the support order, except in very narrowly defined circumstances.

N.C. Gen. Stat. § 52C-2-207(a) provides:

If a proceeding is brought under this Chapter, and one or more child support orders have been issued in this or another state with regard to an obligor and a child, a tribunal of this State shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction:

(1) If only one tribunal has issued a child support order, the order of that tribunal must be recognized.

Most pertinent to the present case are N.C. Gen. Stat. § 52-6-603(c) (1995) and N.C. Gen. Stat. § 52C-6-611 (1995). Section 52C-6-603(c) provides that “Except as otherwise provided in this Article, a tribunal of this State shall recognize and enforce, *but may not modify*, a registered order if the issuing tribunal had jurisdiction.” (emphasis added). Section 52C-6-611, “Modification of child support order of another state,” provides for modification in only two circumstances:

(a) After a child support order issued in another state has been registered in this State, the responding tribunal of this State may modify that order only if, after notice and hearing, it finds that:

(1) The following requirements are met:

(i) The child, the individual obligee, and the obligor do not reside in the issuing state;

(ii) A petitioner who is a nonresident of this State seeks modification; and

(iii) The respondent is subject to the personal jurisdiction of the tribunal of this State; or

(2) An individual party or the child is subject to the personal jurisdiction of the tribunal and all of the individual parties

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have filed a written consent in the issuing tribunal providing that a tribunal of this State may modify the support order and assume continuing, exclusive jurisdiction over the order.

In the subject case, there appears to be no dispute that the Texas courts had jurisdiction to enter the support order under a law "substantially similar" to chapter 52C. Additionally, the trial court found as fact that "the Plaintiff in this matter, Joy Gwenn Hinton, is a citizen and resident of the State of Texas." Therefore, under N.C. Gen. Stat. §§ 52C-2-205(d) and 52C-2-207(a), we must recognize that the Texas courts have continuing, exclusive jurisdiction over the matter.

Since the Texas courts have jurisdiction, section 52C-6-603(c) tells us that a North Carolina court may not modify the order, except as provided in section 52C-6-611. As the individual obligee still resides in Texas, section 52C-6-611's first exception does not apply. Nor does the second exception apply because there is nothing in the record to show that consent has been given for this State to assume continuing, exclusive jurisdiction. Thus, because no exception was applicable, the district court's modification was error.

We recently reached the same conclusion on a similar issue in *Welsher v. Rager*, 127 N.C. App. 521, 491 S.E.2d 661 (1997). In that case, a New York Court entered a support order. While the plaintiff still resided in New York, the defendant moved to North Carolina and fell behind in his child support. After the support order was registered in North Carolina, the plaintiff sued for arrearages. The trial court dismissed the action upon the defendant's unverified written statement that the original support order no longer required him to pay child support. As part of the discussion of that case, we noted that without evidence in the record that the issuing state had lost jurisdiction or that the parties had consented to North Carolina courts having jurisdiction to modify the order, no North Carolina court could modify the order.

[2] Finally, we point out that the trial court's modification of the support order violated a federal statute, 28 U.S.C.A. § 1738B (West Supp. 1997). Under section 1738B, if a child support order is made by a court that had jurisdiction and gave notice and an opportunity for hearing to the parties, a court of another state can not modify the order except as provided. 28 U.S.C.A. § 1738B(a),(c). If either the child or either party continues to reside in the state that originally issued the order, all parties must consent in writing before another

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state may modify the order. 28 U.S.C.A. § 1738B(e). *See also Welsher*, 491 S.E.2d at 665 (discussing and applying section 1738B).

For the reasons given above, we vacate the order modifying the child support order and remand this matter to the district court for further proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges EAGLES and WALKER concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF-APPELLANT v. JAMES DEMPSEY AND REGIONAL ACCEPTANCE CORPORATION, DEFENDANT-APPELLEES

No. COA97-159

(Filed 17 February 1998)

1. Insurance § 474 (NCI4th)— automobile destroyed by fire—interest of loss payee—exclusion for conversion or secretion

The trial court properly granted summary judgment for defendant Regional Acceptance Corporation in a declaratory judgment action to determine plaintiff insurer's liability where plaintiff alleged that Regional held a security interest in the vehicle, that Regional was named as the loss payee on plaintiff's policy, that the insured owner deliberately set the vehicle on fire, and that the intentional burning of the truck constituted a conversion or secretion excluded under the coverage provided to Regional. The policy language "insurance covering the interest of the loss payee shall become invalid only because of your conversion or secretion of your covered auto" extends greater coverage to the loss payee than the insured and is a standard or union mortgage clause.

2. Insurance § 474 (NCI4th)— automobile—deliberately burned—loss payee—plain language of policy—exclusion for secretion or conversion—not applicable

The trial court properly determined that plaintiff-Nationwide is liable to the loss payee (Regional Acceptance Corporation) where the insured owner deliberately burned the vehicle. The plain language of the policy issued by plaintiff to the owner established that the auto must be converted or secreted to invalidate

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the loss payee's interest and the insured's automobile was destroyed by fire. Destruction does not fall within the strictly interpreted definitions of conversion and secretion.

Appeal by plaintiff from order entered 22 November 1996 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 17 November 1997.

Yates, McLamb & Weyher, L.L.P., by R. Scott Brown, O. Craig Tierney, Jr., and Michael W. Washburn, for plaintiff-appellant.

Colombo, Kitchin, Johnson, Dunn & Hill, LLP, by William F. Hill and Micah D. Ball, for defendant-appellee.

McGEE, Judge.

Nationwide filed a declaratory judgment action on 21 July 1995 to determine its liability to James Dempsey, the insured owner of a 1988 Chevrolet pickup truck destroyed by fire, and to Regional Acceptance Corporation (Regional), which held a properly perfected security interest in the vehicle and was named as the "loss payee" on Nationwide's automobile policy. In its declaratory judgment action, Nationwide alleged that it was not obligated to Dempsey for any insurance proceeds because he intentionally set the truck on fire. Nationwide further alleged that it owed nothing to Regional under the loss payable clause attached to the insurance policy because the intentional burning of the truck constituted a "conversion or secretion" of the covered vehicle which is excluded under the coverage provided to Regional under the loss payable clause. James Dempsey did not file an answer and an entry of default was made by the Clerk of Court on 19 April 1996. Both Nationwide and Regional filed motions for summary judgment. After conducting a hearing, the trial court granted summary judgment in favor of Regional and denied summary judgment for Nationwide in an order entered 22 November 1996. Nationwide appeals from this order.

This appeal involves the interpretation of the language contained in the loss payable clause which provides:

Loss or damage under this policy shall be paid as interest may appear to you and the loss payee shown in the Declarations. This insurance covering the interest of the loss payee shall become invalid only because of your conversion or secretion of your covered auto. However, we reserve the right to cancel the policy as

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permitted by policy terms and the cancellation shall terminate this agreement as to the loss payee's interest. We will give the loss payee 10 days notice of cancellation.

The issues are: (1) whether the loss payable clause contained in the insurance contract is a standard mortgage clause insuring the mortgagee's interest in the vehicle from intentional destruction by the insured, and (2) whether the exclusion under the clause applies to bar Regional's claim against Nationwide under the policy.

[1] Provisions in insurance contracts excluding coverage "are not favored and will be construed against the insurer if ambiguous." *N.C. Farm Bureau Mut. Ins. Co. v. Briley*, 127 N.C. App. 442, 446, 491 S.E.2d 656, 658 (1997) (citing *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986)). Thus, "the burden is on the insurance company to set forth clearly and unambiguously" definitions "that eliminate[] guesswork on the part of its insured." *Id.* In the absence of such express definitions of terms in contracts of insurance, they should be interpreted according to their daily usage. *N.C. Farm Bureau Mut. Ins. Co.*, 127 N.C. App. at 448, 491 S.E.2d at 660 (quoting *Insurance Co. v. Insurance. Co.*, 266 N.C. 430, 438, 146 S.E.2d 410, 416 (1966)). Thus, "standard, nonlegal dictionaries may be a more reliable guide to the construction of an insurance contract than definitions found in law dictionaries." *Id.* at 448-49, 491 S.E.2d at 660.

There are two types of mortgagee clauses. *Green v. Insurance Co.*, 233 N.C. 321, 325, 64 S.E.2d 162, 165 (1951). The first, typically referred to as a "standard or union mortgage clause," stipulates that "the interest of the mortgagee in the proceeds of the policy shall not be invalidated by any act or neglect of the mortgagor." *Id.* This type of clause acts as a distinct and independent contract between the insurance company and the mortgagee and "confer[s] greater coverage to the lienholder than the insured has in the underlying policy." *Foremost Ins. Co. v. Allstate Ins. Co.*, 486 N.W.2d 600, 605 fn. 27 (Mich. 1992).

The second type of mortgagee clause is the "open or simple loss-payable clause, which merely provides that the loss, if any, shall be payable to the mortgagee, as his interest may appear." *Green*, 233 N.C. at 325, 64 S.E.2d at 165. In other words, the "rights of the mortgagee under [this type of] clause are wholly derivative, and cannot exceed those of the [insured]." *Id.* at 326, 64 S.E.2d at 166.

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Nationwide argues that the loss payable clause in this insurance contract is an open loss payable clause. We disagree. The clause stated that the “insurance covering the interest of the loss payee shall become invalid only because of your conversion or secretion of your covered auto.” This language clearly extends to the loss payee greater coverage than that extended to Dempsey as it sets out only two instances when the loss payee’s insurance coverage will become invalid. For this reason, we hold that the clause is a standard mortgage clause. Other jurisdictions have interpreted similar language used in a loss payable clause as creating a standard mortgage clause. For example, in *Pittsburgh Natl. Bank v. Motorists Mut.*, 621 N.E.2d 875, 876 (Ohio Ct. App. 1993), the Ohio Court of Appeals held that the following loss payable clause constituted a standard mortgage clause:

LOSS PAYABLE CLAUSE. Loss or damage under this policy shall be paid, as interest may appear, to you and the loss payee [mortgagee] shown in the Declarations. This insurance covering the interest of the loss payee shall not become invalid because of your fraudulent acts or omissions unless the loss results from your conversion, secretion or embezzlement of your covered auto

In *Pittsburgh Natl. Bank*, the car owner intentionally destroyed the insured vehicle. In holding that the clause constituted a “standard mortgage clause” the court distinguished between language in a clause which provides that the coverage for the mortgagee will not be invalidated by any act or neglect of the insured from language in a loss payable clause stating that the proceeds of the policy shall be paid to the mortgagee as his interest may appear.

[2] The next question is whether the conditions of the exclusion have been met. The plain language establishes that the auto must either be converted or secreted to invalidate the loss payee’s interest. “Convert” is defined by The American Heritage Dictionary Second College Edition (1991) as “[t]o change from one use, function, or purpose to another; adapt to a new or different purpose.” This same dictionary defines “secrete” as “[t]o conceal in a hiding place.” In this case, the auto was not changed from one purpose to another, nor was it concealed in a hiding place; rather, it was destroyed by fire. Destruction differs from both secretion and conversion in that it is permanent and the loss payee is left without remedy to recover its loss. Moreover, the rules of construction of insurance contracts

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require that ambiguities be interpreted in favor of the insured and that exclusions be strictly interpreted. *N.C. Farm Bureau Mut. Ins. Co.*, 127 N.C. App. at 446, 491 S.E.2d at 658. Strictly interpreting the definitions of "conversion" and "secretion," we determine that destruction does not fall within either definition. Accordingly, we hold that the vehicle was not secreted or converted and the trial court properly determined that Nationwide is liable to Regional Acceptance Corporation under the loss payee clause.

Affirmed.

Chief Judge ARNOLD and GREENE concur.

IN THE MATTER OF CLINTON ROYAL, PETITIONER

No. COA97-599

(Filed 17 February 1998)

**Hospitals and Medical Facilities or Institutions § 61
(NCI4th)— substance abuse—treatment—order not conditioned on dangerousness**

The trial court exceeded its authority when it ordered Dorothea Dix Hospital to provide substance abuse treatment for petitioner where the order was not conditioned on petitioner's continued qualification as a substance abuser who was dangerous to himself or others as required by N.C.G.S. §122C-287(1).

Appeal by State from order dated 12 February 1997 by Judge Fred M. Morelock in Wake County District Court. Heard in the Court of Appeals 14 January 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Allyson K. Kurzmann and Associate Attorney General Becky A. Beane, for the State.

Legal Services of North Carolina, Mental Health Unit, by Lewis Pitts, for petitioner.

GREENE, Judge.

The State appeals from an order of the trial court directing Dorothea Dix Hospital (DDH) to provide appropriate treatment for

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Clinton Royal (Mr. Royal) “until other more appropriate, less restrictive, long-term residential treatment . . .” was arranged for him.

The facts are as follows: On 9 February 1997, Dr. Stacy Seigel signed an affidavit and petition for involuntary commitment which stated that Mr. Royal was mentally ill, a substance abuser, dangerous to himself or others, and in need of treatment. On the same day at about 11:45 p.m., a magistrate ordered that Mr. Royal be transported to DDH, a 24-hour facility, in accordance with N.C. Gen. Stat. § 122C-281. Dr. John Matthews then examined Mr. Royal on 10 February at 1:15 a.m. and recommended substance abuse commitment at DDH pending a hearing.

On 11 February 1997, Mr. Royal filed a “Petition Seeking Appropriate Treatment And/Or A Hearing Before Discharge” in which he stated that the policy and practice of DDH would be to transport him to the Wake County Area Program Alcohol Treatment Center (Alcohol Treatment Center) for evaluation before a hearing or any treatment for substance abuse. According to Mr. Royal, he would “be evaluated [at] the Alcohol Treatment Center, placed upon a waiting list and then asked to leave until a bed [became] available.” In the petition, Mr. Royal specifically asked the trial court to order DDH to not discharge him but instead, provide him with appropriate treatment at least until other more appropriate treatment is arranged or a hearing could be held. Mr. Royal cited N.C. Gen. Stat. § 122C-57(a) as authority for his claim for treatment. In its order, the trial court stated that it heard from both Mr. Royal and counsel for DDH and directed DDH to “provide [Mr. Royal] appropriate treatment until such time as other more appropriate, less restrictive, long-term residential treatment is arranged and ready for Mr. Royal.”

The dispositive issue is whether the statutory right to age-appropriate treatment for substance abuse, as provided by N.C. Gen. Stat. § 122C-57(a), extends to every person without regard to whether the person meets the statutory criteria for involuntary commitment of substance abusers.

N.C. Gen. Stat. § 122C-57(a) provides that every person “admitted to and . . . receiving services from a facility has the right to receive age-appropriate treatment for mental health, mental retardation, and substance abuse illness or disability.” N.C.G.S. § 122C-57(a) (1996). It is apparently Mr. Royal’s position that once a person is admitted to a

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“facility,”¹ that person is entitled to “age-appropriate treatment for mental health, mental retardation, and substance abuse,” with that right to treatment continuing without regard to whether the person continues to meet the criteria for commitment. We disagree. Section 122C-57(a) sets a level of care to which each person “receiving services” from a “facility” is entitled. If the person is no longer entitled to receive services from the “facility,” it follows that they have no entitlement to treatment or care pursuant to section 122C-57(a). Only those persons found to be substance abusers and dangerous to themselves or others are entitled to the “services” of the facility. N.C.G.S. § 122C-287(1) (1996) (setting out criteria for commitment); N.C.G.S. § 122C-283(d)(1) (1996).

It thus follows that the trial court exceeded its authority when it ordered DDH to provide treatment for Mr. Royal “until such time as other more appropriate, less restrictive, long-term residential treatment is arranged . . .” because the order was not conditioned on Mr. Royal’s continued qualification as a substance abuser who was dangerous to himself or others. *See* N.C.G.S. § 122C-286(h) (1996) (trial court must “find by clear, cogent, and convincing evidence that the respondent meets the criteria” as stated in N.C. Gen. Stat. § 122C-287(1)). The trial court was within its authority, however, to the extent it ordered that Mr. Royal receive treatment while he was lawfully committed to the facility.

Vacated in part.

Judges JOHN and MARTIN, Mark D., concur.

STATE OF NORTH CAROLINA v. RICKY CARLTON EXUM

No. COA97-377

(Filed 3 March 1998)

1. Evidence and Witnesses § 876 (NCI4th)—murder—statements of victim—fear of defendant—admissible

The trial court did not err in a first-degree murder and assault prosecution by admitting statements by the victim to her sister that she was afraid of defendant. Although defendant contended that the statements were residual hearsay and should not have

1. A facility is defined in N.C. Gen. Stat. § 122C-3(14).

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been admitted without a determination of sufficient indicia of reliability, the statements fall squarely within the state of mind exception. The testimony was relevant because it relates to the victim's relationship with defendant immediately preceding her death and factual events are not excluded where the facts serve to demonstrate the basis for the emotions. N.C.G.S. § 8C-1, Rule 803(3).

2. Jury § 194 (NCI4th)— jury selection—defense counsel's brother-in-law—excusal for cause—no abuse of discretion

There was no abuse of discretion in the excusal for cause of a juror where the defense counsel was the juror's brother-in-law. This relationship could impede a juror's ability to render a fair and impartial verdict; additionally the State retained unused peremptory challenges.

Appeal by defendant from judgments dated 3 October 1996 by Judge James D. Llewellyn in Greene County Superior Court. Heard in the Court of Appeals 7 January 1998.

Attorney General Michael F. Easley, by Assistant Attorney General John J. Aldridge, III, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Janine Crawley Fodor, for defendant appellant.

GREENE, Judge.

Ricky Carlton Exum (Defendant) appeals entry of a judgment on a jury verdict finding him guilty of first degree murder and assault with a deadly weapon inflicting serious injury.

Defendant and the victim were married and had four children (sixteen-year-old Kisha, fifteen-year-old Vicki, eleven-year-old Ricky, Jr., and three-year-old Randy) at the time of the victim's murder. Testimony at trial revealed that Defendant had beaten the victim on numerous occasions in the past. Approximately five years before her death, the victim met and subsequently began a regular affair with Aquilla Blount (Blount), a friend of the family. Approximately three months prior to her death, the victim and Blount were attacked by Defendant during daylight hours at Speight Bridge. As a result of this attack, Blount, the victim, and Randy (who was with his mother at the time), had to be treated at the hospital for the injuries they received. Following this attack, the victim took her children and went to a bat-

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tered women's shelter (the Shelter) instead of returning to the marital home. The victim's sister, Mary Wooten (Wooten) visited the victim several times while she was staying at the Shelter, and was allowed to testify, without any objection from Defendant, to the following conversation between herself and the victim while the victim was residing at the Shelter:

[The victim] said it had got to the point that she knew that she was just going to have to leave or he was going to have to leave or something. Because she said at that point he acted like he was trying to kill her the way he was hitting at her at the bridge that time. She said that she could tell that if he could have really got to her like he was trying to that day that he probably would have killed her that day.

When the victim was ready to leave the Shelter, Wooten drove her and the children to Wooten's home, where they remained for a few days. The victim and her children then moved into the home of the victim's parents.

On 15 June 1993, while continuing to reside at her parents' home, the victim was attacked by Defendant in her parents' yard. Wooten was allowed to testify, again without any objection from Defendant, to the following conversation between herself and the victim:

Q: What did [the victim] tell you happened while she was staying at her parents' house?

A: She said one morning she—everybody had left . . . and she was there by herself.

And she said she walked out in the garden . . . and he came running out from behind a tobacco barn. And they got to—they got to arguing at that time. And she said at that time that's when he—that was the time he almost strangled her to death.

Q: Did she ever show you any marks or bruises about her body when she was telling you this?

A: Yes. She had—like all around her neck you could tell that he had had a hold of her because there were marks all around her neck and up under here. Under here somewhere it was like a flesh wound. You could see the meat around her neck. (Indicating.)

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Q: When your sister was telling you about this . . . could you describe how she was acting?

A: She was acting—shaky voice, chills. Like, fearful.

Q: Did she say anything about [Defendant] when she was telling you this?

A: She was saying like [Defendant] was just mean. She said she don't know where he popped up from that early in the morning and everybody had just left the house. She said he's just mean. He's just mean. I believe he's trying to kill me. I know he is.

The police responded to a call regarding this attack, and the victim went to the police station that day, 15 June 1993, and spoke to the sheriff about the attack. The sheriff testified that “[the victim] conveyed to me that she was scared [Defendant] was going to kill her.” The sheriff instructed the victim to take out a warrant against Defendant. The victim obtained a warrant against Defendant for assault on 15 June 1993, and a deputy testified that he attempted to serve the warrant but could not find Defendant. The deputy did notify Defendant's mother, who testified that Defendant had lived with her for some time preceding the murder, that a warrant for Defendant's arrest for assault had been issued. On Friday, 25 June 1993, the original date scheduled for a hearing on the assault charge, Defendant appeared voluntarily at the sheriff's department to have the warrant served. Defendant signed a written promise to appear in court on the following Friday, 2 July 1993, regarding the assault charge. Defendant spoke to the sheriff after his arrest and release on bail for the assault charge, and the sheriff conveyed to Defendant the victim's fear of Defendant, requested that Defendant not return to the marital home, and suggested that Defendant “seek counsel for visitation with his children in a separation.” Defendant related to the sheriff his concerns over the affair between the victim and Blount, and agreed not to go to the marital home.

The victim had appeared in court that same morning, 25 June 1993, pursuant to the scheduled hearing date on the assault warrant. Defendant, who was not served with the warrant until he appeared at the sheriff's department that afternoon, did not appear for court. After leaving the courthouse that day, the victim spoke with Wooten, and Wooten was allowed to testify at trial over Defendant's objection to her conversation that evening with the victim, as follows:

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Q: Did your sister [the victim] talk to you, [Wooten,] about coming to court the Friday before she was killed?

A: Uh-huh. (Yes.)

Q: What did she tell you about that?

....

A: [The victim] was saying that . . . [Defendant] didn't come or something, but then they said he showed up in court later and they just let him out on bond.

She was saying that it seemed like every time they would ever even go to court, it would be the same thing. He would be out. He just like slipped through—I mean, he would be out and right back doing the same thing.

And she said it seemed like every time he would go in and out, he would beat her worse than what he would do before. It would be worse on her for even taking out a warrant on him.

....

Q: When was the last time you talked to [the victim] before she died?

A: It was that—I think it was that Saturday morning or that Friday—no. It was that Friday evening, I think. I know I talked with her after she came out of court that Friday evening. I think that was the last time.

Q: Did you talk to her in person or over the phone?

A: No, it was in person. Because she was telling me about—I think it was in person because she was telling me about he didn't come to court that morning. She said I was sitting in there and he weren't even there.

....

Q: And did [the victim] tell you anything else about [Defendant] other than what you've just testified about during that last conversation with her?

A: No, not that I can remember. She was just saying that he didn't show up for court. And she didn't know what had happened because they were supposed to have went to court that morning.

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Q: During that last conversation you had with [the victim], . . . did [she] tell you how she felt toward [Defendant]?

A: She was saying that she didn't never want to go back to him no more.

Q: Did she tell you why she felt that way?

A: Because she was afraid of him. She felt like he was trying to kill her.

Either that night or during the next day, Saturday, the victim and her children returned to the marital home, apparently for the first time since Defendant's attack at Speight's Bridge. On Sunday morning, 27 June 1993, Defendant appeared at the marital home at 8:00 a.m. The three eldest children testified that Defendant and the victim were talking loudly or arguing in the kitchen about the victim "[taking Defendant] to court that Friday," a "court paper," and about the victim's affair with Blount. Defendant followed the victim out into the yard, and the three eldest children heard their mother scream and ran outside to investigate. Vicki testified that she saw her mother "getting up off the ground brushing herself off." Defendant then reached into his sock and removed a long-bladed knife. Vicki testified that she ran back into the house at this point to call the police. Vicki testified that the 911 operator who answered "told me to calm down because they couldn't hear me, hear what I was saying, so I hung up the phone on them. And I had to end up calling them back." Ricky, Jr. testified that he ran outside when he heard "somebody holler." He saw his mother brushing herself off. The victim then "looked up and saw the knife and then she took off running." Kisha testified that "I just heard mama hollering and I ran outside." Kisha saw Defendant take a knife out of his sock and saw her mother run behind the barn, with Defendant following her. "And after she got to the barn, she fell in a hole." Defendant caught up with the victim at this point and began stabbing her with the knife. The children repeatedly yelled to their father to stop, but Defendant told the children "ya'll better move." The victim was able to get up and get away from Defendant and to run back to the house and into her bedroom. Defendant followed her, as did the children, and when the children arrived in the bedroom, Defendant was "holding [the victim] by the top of her head" and stabbing her. At one point the knife fell to the floor and Kisha attempted to pick it up before Defendant did. Defendant pulled the knife from Kisha's hands, severely cutting Kisha's fingers. Kisha subsequently had hand surgery, but testified at trial that she still could not bend her fingers.

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After Defendant regained possession of the knife, the three eldest children managed to push Defendant into a corner, and were “trying to hold him . . . pushing him back.” Defendant told the children “to move; get out of the way.” The victim attempted to stand up and run from the room at this point, and Defendant “reached over all of us [children] and stabbed her in her neck . . . and a whole lot of blood came out of her neck.” Ricky, Jr. testified that he and his mother ran from the bedroom and back outside, and once back in the yard his mother “started staggering everywhere and then she had fell down.” Kisha and Vicki testified that Defendant then left the house, stepped over the victim and said, “Die Bitch” as he walked away. Vicki testified that she asked her father “why did he do that . . . why did he do it?” as he was walking away, and he responded that “[the victim] was messing around on him.”

During jury selection, a juror was excused for cause by the trial court because the defense counsel was the juror’s brother-in-law. At trial, Defendant’s counsel argued before the jury that Defendant did stab the victim to death, but contended that Defendant did so without premeditation or deliberation. Judgments were entered on the jury’s determination that Defendant was guilty of first degree murder, for which Defendant was sentenced to life imprisonment, and of assault with a deadly weapon inflicting serious injury, for which Defendant was sentenced to ten additional years. Defendant appeals these judgments.

The issues are whether: (I) the victim’s fact-laden statements fall within the Rule 803(3) hearsay exception for statements of the declarant’s then-existing state of mind; and (II) excusing a juror for cause due to his relationship with defense counsel was error.

I

[1] Defendant contends that statements made by the victim to her sister, Wooten, were Rule 804(b)(5) residual hearsay, and therefore could not be admitted absent a determination by the trial judge that the testimony bore sufficient indicia of reliability. *See State v. Triplett*, 316 N.C. 1, 8, 340 S.E.2d 736, 740 (1986) (requiring a six-part inquiry as to the admissibility of residual hearsay). The State contends, however, and we agree, that the statements fall squarely within N.C. Gen. Stat. § 8C-1, Rule 803(3), and therefore required no *Triplett* findings for admissibility. *See State v. Rogers*, 109 N.C. App. 491, 499, 428 S.E.2d 220, 225, *cert. denied*, 334 N.C. 625, 435 S.E.2d 348 (1993),

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cert. denied, 511 U.S. 1008, 128 L. Ed. 2d 54, *reh'g denied*, 511 U.S. 1102, 128 L. Ed. 2d 495 (1994) (“Our Courts also have held that statements admissible under a traditional, or “firmly rooted,” hearsay exception are deemed inherently trustworthy”).

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted,” N.C.G.S. § 8C-1, Rule 801(c) (1992), and “is not admissible except as provided by statute or by the North Carolina Rules of Evidence,” *State v. Wilson*, 322 N.C. 117, 131-32, 367 S.E.2d 589, 598 (1988). Rule 803(3) of the Rules of Evidence allows for admission of hearsay testimony if it “tend[s] to show the victim’s [then-existing] state of mind” *State v. Bishop*, 346 N.C. 365, 379, 488 S.E.2d 769, 776 (1997). Our Supreme Court has stated that the underlying policy supporting Rule 803(3) is the “fair necessity, for lack of other better evidence, for resorting to a person’s own contemporary statements of his mental or physical condition” *State v. Hardy*, 339 N.C. 207, 229, 451 S.E.2d 600, 612 (1994) (holding that the victim’s written statements “express[ed] no emotion” and were therefore inadmissible). Statements merely relating factual events do not fall within Rule 803(3) because, in contrast to statements of mental or physical condition, factual circumstances are provable by better evidence, such as the testimony of those who witnessed the events. *Id.* The victim’s statements relating factual events that tend to show the victim’s state of mind when making the statements, however, are not excluded from the coverage of Rule 803(3) where the facts related “serve . . . to demonstrate the basis for the [victim’s] emotions.” *State v. Gray*, 347 N.C. 143, 173, 491 S.E.2d 538, 550 (1997) (explaining that the Court in *Hardy* found the victim’s statements inadmissible because they were “totally without emotion”). Cf. *State v. Alston*, 307 N.C. 321, 328, 298 S.E.2d 631, 637 (1983) (deciding under common law principles prior to the adoption of the Rules of Evidence that “the naked assertion by a victim prior to his death that he fears the defendant should not be admitted into evidence absent some evidence tending to show a factual basis for such alleged fear”). The determination that fact-laden statements are not excluded from the coverage of Rule 803(3) where they tend to show the speaker’s then-existing state of mind is further supported by the federal courts’ interpretation of federal rule 803(3).¹

1. Federal rule 803(3) and our Rule 803(3) are identically worded. See Fed. R. Evid. 803(3) and N.C.G.S. § 8C-1, Rule 803(3) (1992).

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In the first place, it is in the nature of things that statements shedding light on the speaker's state of mind usually allude to acts, events, or conditions in the world, in the sense of making some kind of direct or indirect claim about them. . . .

In the second place, fact-laden statements are usually deliberate expressions of some state of mind. . . . [I]t does not take a rocket scientist . . . to understand that fact-laden statements are usually purposeful expressions of some state of mind, or to figure out that ordinary statements in ordinary settings usually carry ordinary meaning. In the end, most fact-laden statements intentionally convey something about state of mind, and if a statement conveys the mental state that the proponent seeks to prove, it fits the [federal rule 803(3)] exception.

4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 438, p. 417-18 (2d ed. 1994) (explaining why federal courts prefer a broad reading of federal rule 803(3)).

In this case, the victim's sister, Wooten, was allowed to testify, over Defendant's objection, about a conversation she had with the victim after the victim returned from court on the Friday before her death. Wooten testified that the victim told her that Defendant had not shown up for court, and that it seemed to the victim that "every time they would ever even go to court, it would be the same thing . . . he just like slipped through . . . [and the victim] said it seemed like every time he would go in and out, he would beat her worse than what he would do before." During the same conversation, the victim stated to Wooten that she was "afraid" of Defendant. This testimony "tend[ed] to show" the victim's fear and frustration at the time of the conversation, and the attendant factual circumstances described by the victim served only to demonstrate the basis for these emotions.

Wooten was also allowed to testify that, while visiting the victim at the Shelter,

[the victim] said at that point [Defendant] acted like he was trying to kill her the way he was hitting at her at the bridge that time. She said that she could tell that if he could have really got to her like he was trying to that day that he probably would have killed her that day.

This testimony was admitted without any objection from Defendant, but Defendant contends that its admission without findings as to reliability amounts to plain error. These statements, however, especially

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viewed in light of the fact that the victim had moved from Defendant's home and into a battered women's shelter following the incident described, tended to show the victim's then-existing fear of Defendant. *See State v. Mixion*, 110 N.C. App. 138, 148, 429 S.E.2d 363, 368 (1993) (holding that it was not necessary that the victim explicitly state that she was afraid, so long as the "scope of the conversation . . . related directly to [the victim's] existing state of mind and emotional condition"); *State v. Lynch*, 327 N.C. 210, 221, 393 S.E.2d 811, 817 (1990) (victim's statements admissible under Rule 803(3) where witness testified that she could tell the victim was frightened because "[s]he had fear in her voice").

Finally, Wooten testified as to a conversation she had with the victim after the victim left the Shelter and moved in with her parents. The victim told Wooten that Defendant had attacked her in her parents' garden and Defendant had "almost strangled her to death." Wooten testified that while they talked, the victim "was acting—shaky voice, chills. Like, fearful." Finally, the victim told Wooten during this conversation that Defendant "was just mean. She said she don't know where he popped up from that early in the morning and everybody had just left the house. She said he's just mean. He's just mean. I believe he's trying to kill me. I know he is." Defendant contends that this testimony, which was admitted without *Triplett* findings absent any objection, likewise amounts to plain error. This conversation between Wooten and the victim, however, "tend[ed] to show" the victim's fear of Defendant at the time of the conversation. The additional facts elicited during the conversation were merely surrounding factual circumstances serving "to demonstrate the basis" for the victim's fear. *Gray*, 347 N.C. at 173, 491 S.E.2d at 550.

For admission under Rule 803(3), the state of mind testimony must also be relevant to the issues in the case. *Bishop*, 346 N.C. at 379, 488 S.E.2d at 776. Here, the victim's state of mind during each of the three conversations at issue is relevant because it relates to her relationship with Defendant immediately preceding her death. *See State v. Scott*, 343 N.C. 313, 335, 471 S.E.2d 605, 618 (1996) ("It is well established in North Carolina that a murder victim's statements falling within the state of mind exception to the hearsay rule are highly relevant to show the status of the victim's relationship to the defendant."). Wooten's testimony as to the victim's statements during each of the above conversations falls within a "firmly rooted" hearsay exception, Rule 803(3), and the court was therefore not required to make *Triplett* findings as to the reliability of these statements.

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II

[2] Defendant also contends that a juror was improperly excused for cause by the court, and he should therefore receive a new trial. We disagree.

“A defendant is not entitled to any particular juror. His right to challenge is not a right to select but to reject a juror.” *State v. Harris*, 338 N.C. 211, 227, 449 S.E.2d 462, 470 (1994). N.C. Gen. Stat. § 15A-1212 lists grounds for the automatic disqualification of a juror, and provides for a challenge for cause on the ground that the juror “[f]or any other cause is unable to render a fair and impartial verdict.” N.C.G.S. § 15A-1212(9) (1997). A juror’s fitness to serve “is a matter within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion.” *State v. Abraham*, 338 N.C. 315, 343, 451 S.E.2d 131, 145 (1994). *See also State v. Jones*, 339 N.C. 114, 143-44, 451 S.E.2d 826, 481 (1994), *cert. denied*, — U.S.—, 132 L. Ed. 2d 873, *reh’g denied*, — U.S. —, 132 L. Ed. 2d 913 (1995) (“[A] trial judge’s decision to excuse a juror . . . is entitled to deference because ‘there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.’ ”). Additionally, where the State retains peremptory challenges at the end of jury selection, even the improper excusal of a juror for cause is generally not reversible error. *See Harris*, 338 N.C. at 227, 449 S.E.2d at 470.

In this case, a juror was excused for cause because the defense counsel was his brother-in-law. This relationship could impede a juror’s ability “to render a fair and impartial verdict.” It was therefore not an abuse of the trial court’s discretion to excuse this juror for cause. In addition, the State retained unused peremptory challenges at the end of jury selection.

No error.

Judges JOHN and MARTIN, Mark D., concur.

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LARRY D. COPPLEY, PLAINTIFF v. MONA BROCK COPPLEY, DEFENDANT

No. COA97-10

(Filed 3 March 1998)

1. Courts § 111 (NCI4th)— failure to record hearing—not prejudicial error

A hearing on defendant's Rule 60(b) motion to set aside a domestic consent order was a trial within the meaning of N.C.G.S. § 7A-198(a) and, in light of the gravity of the allegations, the trial court erred by not recording those proceedings. However, there was no prejudice because the record includes both parties' versions of those proceedings.

2. Divorce and Separation § 10 (NCI4th)— consent agreement—coercion and duress—motion to set aside

The trial court abused its discretion in denying defendant's motion to set aside a domestic consent order where it was clear that defendant was in a vulnerable position and at the mercy of plaintiff, who determined her rights in regard to her children; that plaintiff engaged in subtle manipulation of defendant in that vulnerable position by threatening defendant's relationship with her children if she did not sign the consent order and go along with his terms for custody, support, and distribution of the marital property; and that defendant was thereby robbed of taking action of her own free will, preventing the giving of true consent. There was no error in the trial court's findings and conclusions regarding the absence of fraud and misrepresentation, but the findings did not support the conclusion that there was insufficient evidence that the consent order was the result of misconduct.

Appeal by defendant from orders entered 26 January and 7 June 1996 by Judge James M. Honeycutt in Davidson County District Court. Heard in the Court of Appeals 9 September 1997.

Wilson, Biesecker, Tripp & Sink, by Max R. Rodden, for plaintiff-appellee.

Hamrick & Associates, by Diane Q. Hamrick, and Edward P. Hausle, P.A., by Edward P. Hausle, for defendant-appellant.

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TIMMONS-GOODSON, Judge.

Plaintiff Larry D. Coppley and defendant Mona Brock Coppley were married on 19 November 1978. They are the parents of two minor children, Nicholas and Adam. Plaintiff filed a complaint on 26 April 1995 seeking sole custody of the minor children, child support, sequestration of the marital residence, and equitable distribution. On 3 May 1995, Judge James M. Honeycutt entered a consent order in Davidson County District Court, which purported to resolve all claims of the parties. These proceedings were not recorded.

After being denied visitation or contact with her children subsequent to the entry of the consent order, defendant filed a motion to set aside the 3 May 1995 consent order. Defendant alleged that plaintiff had engaged in fraud, misrepresentation and misconduct to induce her to enter into the consent order. This motion came on for hearing before Judge Honeycutt during the 13 September 1995 civil session of Davidson County District Court. Although defendant requested that the hearing be recorded on the court's recording equipment, no recording of the proceeding has ever been located, nor has any evidence been presented indicating that the proceedings were recorded.

The testimony of defendant and her two witnesses tended to show the following. On 22 April 1995, after plaintiff discovered defendant's marital infidelity, plaintiff insisted and defendant agreed to an immediate separation. Plaintiff also insisted that the two minor children remain with him. Defendant would be given visitation provided that she complied with plaintiff's demands and did not seek custody of the children. At plaintiff's insistence, on that same evening, defendant prepared a handwritten list of items that she wanted from the marital home. On a separate sheet of paper, plaintiff wrote down some provisions for their separation.

Both parties signed the papers and had them notarized. After having the documents notarized, defendant gave them to plaintiff, who refused to give her a copy. Although the list prepared by defendant did not contain some of the items that defendant wanted, she felt bound by it. Plaintiff told defendant that if she contacted an attorney, he would drag her and the minor children "through the mud."

After defendant left the marital residence, plaintiff immediately changed the locks and security codes at the residence. Plaintiff also closed all of the couple's joint savings and checking accounts. On 24

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April 1995, plaintiff telephoned defendant at work and requested that she prepare a list of the couple's monthly bills, as she had handled such matters in the past. Defendant prepared the list of bills and took it by the marital residence on 25 April 1995. When defendant attempted to stay, plaintiff refused to let her do so. In fact, all of defendant's attempts to return to the marital home or see the minor children were foiled by plaintiff.

The parties and some relatives met at a church on 27 April 1995 to discuss the previous days' events and the possibility of reconciliation. Plaintiff was not responsive to any suggestion of reconciliation. Defendant's mother recommended that defendant get an attorney, but she did not do so. The parties and some of their relatives met a second time on 2 May 1995 to discuss child custody, visitation and support. Plaintiff remained adamant that he retain custody of the children, but agreed to allow defendant visitation at his discretion. Defendant does not recall signing any papers at this meeting. During this meeting, defendant agreed to pay \$300.00 per month for support of the minor children. Although plaintiff had already instituted this action, he did not tell defendant. Instead, he told her that, on the following day, they needed to meet to sign some papers.

On 3 May 1995, the parties met at Wachovia Bank in Lexington, North Carolina. Defendant was alone, because she thought that she was going to a magistrate's office to sign some papers. Instead, the parties met at the bank and walked to an office building next to it, which was, in fact, the office of plaintiff's attorney. When defendant found out that plaintiff had an attorney and had filed a lawsuit, she asked plaintiff if she needed to call her father. Plaintiff told her that she did not need to do so. Plaintiff's attorney told defendant to sign the papers, so that the sheriff would not have to formally serve them on her. Defendant signed all of the papers given to her by the attorney, in spite of some changes in the terms agreed upon during the couple's previous discussions. Defendant was taking prescription medicine at this time.

The parties then went before Judge Honeycutt for entry of a consent order. Upon being asked if she understood the order and if she had any questions about it, defendant answered "yes." Thereafter, Judge Honeycutt signed the order and directed that it be filed.

The testimonies of defendant's two witnesses—her mother, Carolyn Brock, and her supervisor at work, Nikki Key—both indicated that defendant was very upset and crying uncontrollably from

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22 April to 3 May 1995. Carolyn Brock indicated that defendant had been placed on prescription medicine in an effort to improve her mental state. Both witnesses attested to plaintiff's attempt to foil any contact between defendant and her children. Further, they stated that defendant thought that she would be seeing a magistrate, and not a judge, on 3 May 1995.

After the presentation of defendant's evidence, plaintiff made a motion to dismiss pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. The trial court, after hearing the arguments of both parties, entered an order on 26 January 1996 granting plaintiff's motion and dismissing defendant's motion to have the 3 May 1995 consent order set aside.

Thereafter, plaintiff filed a motion for attorneys fees, supported by the affidavit of his attorney. This motion was heard by Judge Honeycutt at a special session of Davidson County District Court on 22 February 1996. By corrected order entered 7 June 1996, Judge Honeycutt allowed this motion. Defendant appeals.

Defendant presents some seven arguments on appeal, in which defendant argues for reversal of the trial court's order granting plaintiff's Rule 41(b) dismissal of her Rule 60(b) motion to set aside the 3 May 1995 consent order. After a thorough review of these arguments, we conclude that the trial court committed reversible error in denying defendant's Rule 60(b) motion to set aside the 3 May 1995 consent order and granting plaintiff's Rule 41(b) dismissal of defendant's motion, as there was sufficient evidence that the 3 May 1995 consent order was the result of plaintiff's use of duress and/or undue influence in negotiation of said order.

[1] Defendant first argues that the trial court erred in failing to preserve a transcript of the 3 May and 13 September 1995 court proceedings. North Carolina General Statutes section 7A-198(a) provides:

Court-reporting personnel shall be utilized, if available, for the reporting of civil trials in the district court. If court reporters are not available in any county, electronic or other mechanical devices shall be provided by the Administrative Office of the Courts upon request of the chief district judge.

N.C. Gen. Stat. § 7A-198(a) (Cum. Supp. 1997). In *Miller v. Miller*, 92 N.C. App. 351, 374 S.E.2d 467 (1988), this Court addressed the issue of whether a hearing conducted on a motion in the cause requesting

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a modification of a child custody order is a “trial” within the meaning of General Statutes section 7A-198(a). We answered in the affirmative, stating, “We strongly disapprove of the failure to comply with the mandate of G.S. 7A-198.” *Id.* at 354, 374 S.E.2d at 469. The mere violation of the statute, however, was not enough to afford the defendant relief, as she failed to show prejudicial error. *Id.*; see *In re Nolen*, 117 N.C. App. 693, 453 S.E.2d 220 (1995); *McAlister v. McAlister*, 14 N.C. App. 159, 187 S.E.2d 449, *cert. denied*, 281 N.C. 315, 188 S.E.2d 898 (1972). The Court then dismissed the appeal for failure to include any recitation of the evidence presented at trial. In doing so, the Court

note[d] that means were available for defendant to compile a narration of the evidence, i.e., reconstructing the testimony with the assistance of those persons present at the hearing. If appellee was then to contend the record on appeal was inaccurate in any respect, the matter could be resolved by the trial judge in settling the record on appeal.

Miller, 92 N.C. App. at 354, 374 S.E.2d at 469 (citation omitted).

In the instant case, by defendant’s own admission, the 3 May 1995 proceedings before Judge Honeycutt lasted a mere five minutes—long enough to inquire as to whether both parties agreed to the provisions of the consent order. This proceeding was not, then, a trial within the meaning of section 7A-198(a) of our General Statutes. We now examine the circumstances surrounding the 13 September 1995 hearing on defendant’s Rule 60(b) motion to set aside the 3 May 1995 consent order.

At the 13 September 1995 hearing, Judge Honeycutt stated that he had no independent recollection of the previous 3 May 1995 proceedings, but noted that if he did, he would let the parties know and consider recusing himself. Significantly, however, in the court’s findings of fact in its 26 January 1996 order, the trial court stated, “The undersigned does not recall the defendant being emotionally distraught or mentally or physically impaired when she appeared before him for entry of the consent order on May 3, 1995[,]” in direct contravention of its earlier disavowal of independent recollection of the previous proceedings. If the trial court did recall the information as indicated in this finding, he had promised the parties that he would inform them and possibly recuse himself, as he may be a possible witness in future proceedings in this matter. There is no evidence in the record that such action was ever taken.

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Although it is true, as plaintiff contends, that there is a “long-standing rule . . . that there is a presumption in favor of regularity and correctness in proceedings in the trial court,” *Harvey & Son v. Jarman*, 76 N.C. App. 191, 195, 333 S.E.2d 47, 50 (1985), where the appellant presents evidence to rebut such a presumption, this Court will not turn a deaf ear to that evidence. Moreover, while “[i]t is the appellant’s responsibility to make sure that the record on appeal is complete and in proper form,” *Miller*, 92 N.C. App. at 353, 374 S.E.2d at 468, where the appellant has done all that she can to do so, but those efforts fail because of some error on the part of our trial courts, it would be inequitable to simply conclude that the mere absence of the recordings indicates the failure of appellant to fulfill that responsibility.

After examination of the record, we conclude that the 13 September 1995 hearing on defendant’s Rule 60(b) motion to set aside the 3 May 1995 consent order was a trial within the meaning of General Statutes section 7A-198(a). Moreover, in light of the gravity of the allegations and proceedings surrounding defendant’s Rule 60(b) motion to set aside the consent order, we conclude that it was error for the trial court to fail to record (or produce those recordings of) those proceedings. Defendant cannot, however, show prejudice in the instant case as the record includes both parties’ versions of the 13 September 1995 proceedings. Hence, we proceed to defendant’s next argument.

[2] Defendant next argues that the trial court erred in denying her motion for relief from the 3 May 1995 consent order when she established a basis for relief from that order. Rule 60(b) provides that a party may be granted relief from judgment or an order for “[f]raud (. . . intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]” N.C.R. Civ. P. 60(b)(3). A trial court’s ruling on a Rule 60(b) motion is reviewable only for an abuse of discretion. *Harris v. Harris*, 307 N.C. 684, 300 S.E.2d 369 (1983). The trial court’s findings of fact are conclusive on appeal, if supported by competent evidence. *Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 219 S.E.2d 787 (1975). However, those conclusions of law made by the court are reviewable on appeal. *Id.*

In the instant case, we find no error in the trial court’s findings and conclusions regarding the absence of fraud and misrepresentation. We cannot, however, agree that the trial court’s findings support its conclusion that there was “insufficient evidence to support

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defendant's contention that the consent order was the result of . . . misconduct"—in this instance, duress and/or undue influence.

In *Stegall v. Stegall*, this Court, quoting the Supreme Court in *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971), stated:

"Duress is the result of coercion." "Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." "It may exist even though the victim is fully aware of all facts material to his or her decision."

Stegall v. Stegall, 100 N.C. App. 398, 401, 397 S.E.2d 306, 307-08 (1990) (quoting *Link*, 278 N.C. at 191, 194, 179 S.E.2d at 703, 704-05)) (alterations in original) (citations omitted), *disc. review denied*, 328 N.C. 274, 400 S.E.2d 461 (1991). In *Stegall*, we also noted the "[f]actors relevant in determining whether a victim's will was actually overcome":

"the age, physical and mental condition of the victim, whether the victim had independent advice, whether the transaction was fair, whether there was independent consideration for the transaction, the relationship of the victim and alleged perpetrator, the value of the item transferred compared with the total wealth of the victim, whether the perpetrator actively sought the transfer and whether the victim was in distress or an emergency situation."

Id. at 401-02, 397 S.E.2d at 308 (quoting *Curl v. Key*, 64 N.C. App. 139, 142, 306 S.E.2d 818, 820 (1983), *rev'd on other grounds*, 311 N.C. 259, 316 S.E.2d 272 (1984)). In *Link*, our Supreme Court adopted the rule

"that the act done or threatened may be wrongful even though not unlawful, *per se*; and that the threat to institute legal proceedings, criminal or civil, which might be justifiable, *per se*, becomes wrongful, within the meaning of this rule, if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings."

Id. at 194, 179 S.E.2d at 705.

In the instance where the court cannot find sufficient threat to constitute duress, it may still find the presence of undue influence. In *Edwards v. Bowden*, this Court quoted with approval *Pollock on Contracts* and *Pomeroy on Equity Jurisprudence*:

"Any influence brought to bear upon a person entering into an agreement or consenting to a disposal of property, which, having

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regard to the age, capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment." Pollock on Contracts, 524. "Where there is no coercion amounting to duress, but a transaction is the result of a *moral, social or domestic* force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances, undue influence naturally has a field to work upon in the conditions or circumstances of the person influenced, which renders him peculiarly susceptible and yielding; his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessities, his ignorance, lack of advice, and the like." Pomeroy, Equity Jurisprudence, 951.

Edwards v. Bowden, 107 N.C. 58, 62-63, 12 S.E. 58, 59 (1890), quoted in *Link*, 278 N.C. at 195-96, 179 S.E.2d at 706.

The evidence in the instant case tends to show that plaintiff, upon discovering that defendant had been unfaithful to him, demanded that the parties immediately separate, and make immediate arrangements for the custody of their minor children and distribution of the marital property. Plaintiff told defendant that if she did not complete, sign, and notarize a document purporting to govern their separation, he would take her to court and expose the minor children to the facts surrounding their separation. Although defendant was accompanied by relatives during subsequent meetings with plaintiff to further negotiate a separation agreement, defendant had already been warned by plaintiff (and plaintiff had reiterated on several occasions) that he would disgrace her in court, and subject the minor children to custody proceedings in court, if she did not comply with his wishes. Advice from her mother and supervisor went unheeded due, at least in part, to plaintiff's veiled threats. In fact, there was evidence tending to show that defendant's attempts to see her sons were indeed foiled from 23 April to 3 May 1995, and since 3 May 1995, visitation with the boys has been sparse. There was further evidence that defendant was under the influence of prescription medication to help her with "uncontrollable bouts of crying" and insomnia, at the time of the 3 May 1995 hearing. Defendant contends that she was "shocked

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and confused" on the day that she appeared before Judge Honeycutt for entry of the consent order. She had just found out that plaintiff had an attorney, had been served with the summons and complaint, had signed over her share in the marital home, and found herself in front of a judge, instead of the magistrate, who she believed would hear the case.

Again, Judge Honeycutt made a finding of fact in the 26 January 1996 order granting plaintiff's Rule 41(b) motion for involuntary dismissal that "The undersigned does not recall the defendant being emotionally distraught or mentally or physically impaired when she appeared before him for entry of the consent order on May 3, 1995." However, the opening paragraph of that order specifically avers, "Judge Honeycutt indicated he had no independent recollection of the parties appearing before him for the entry of the Consent Order and further indicated that should he have the same, he would consider recusal at that time." One who has no independent recollection of the parties appearing before him cannot then make a finding as to the mental or physical condition of one of the parties on that occasion. As this finding of fact is clearly in conflict with the evidence before us on appeal, it fails.

Inexorably, the evidence, in light of the existing case law, leads us to the conclusion that there was sufficient evidence to show misconduct on plaintiff's part, so as to render the 3 May 1995 consent order void. Looking at the totality of the circumstances, defendant was in distress, torn between her wish to protect her children and her wish to reach an equitable separation agreement. Plaintiff was aware of his wife's vulnerability, since she had pleaded with him on a number of occasions to try to work things out, to let her see her children, and to reach a fair agreement. Plaintiff actively sought the agreement as written: (1) he insisted on the evening of 22 April 1995, that something had to be agreed upon, signed, and notarized that night; and (2) subsequently, he contacted her to get a final separation agreement completed. Defendant's Exhibit 2, not admitted into evidence at the 13 September 1995 hearing, but now a part of the record on appeal, further discloses the inequities of the consent order—in that plaintiff received more than 80% of the marital estate.

The trial court found that defendant made a "calculated decision" to enter into a settlement of all marital issues with plaintiff, and that she had sufficient education and intelligence to appreciate the situation and understand the provisions of the consent order before sign-

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ing it. However, plaintiff could not make a calculated decision when she was effectively robbed of her free will with threats of harm to her children, or loss of visitation with her children. Pointedly, the 26 January 1996 order is silent as to plaintiff's behavior in reference to withholding defendant's visitation with the children. Although defendant was not threatened with any show of physical force or violence, this is not conclusive on the issue of duress in this case.

As our Supreme Court stated in *Link*, "Duress is the result of coercion." *Id.* at 191, 179 S.E.2d at 703. Coercion may be both physical and mental. The facts in the instant case tend to show a rather striking resemblance to duress and/or undue influence as described in *Link*, *Edwards*, and *Stegall*. It is clear that defendant was in a vulnerable position—at the mercy of plaintiff, who determined defendant's rights in regards to her children; that plaintiff engaged in subtle manipulation of defendant in that vulnerable position—threatening defendant's relationship with her children if she did not sign the consent order and go along with his terms for the custody and support of the minor children, and the distribution of the marital property; and that defendant was thereby robbed of taking action of her own free will, preventing the giving of true consent. Thus, we conclude that the trial court abused its discretion in denying defendant's motion to set aside the 3 May 1995 consent order, and dismissing the motion pursuant to Rule 41(b).

In light of our conclusion in this regard, we need not address defendant's remaining arguments. Accordingly, we reverse the 26 January 1996 order denying defendant's motion to set aside the 3 May 1995 consent order. It, then, follows that the 7 June 1996 order allowing plaintiff's motion for counsel fees is also reversed.

Reversed.

Judges EAGLES and MARTIN, John C., concur.

BROWN v. FLOWE

[128 N.C. App. 668 (1998)]

VICKIE ANN BROWN, ADMINISTRATRIX OF THE ESTATE FOR MARY LOUISE BROWN,
PLAINTIFF-APPELLEE V. KENNETH MICHAEL FLOWE, M.D., DEFENDANT-APPELLANT

No. COA97-611

(Filed 3 March 1998)

1. Judgments § 651 (NCI4th)— prejudgment interest—settlement amount with other parties included—double recovery

The trial court erred in a medical malpractice claim by awarding plaintiff prejudgment interest on the full amount of the verdict where plaintiff had settled with another doctor and the hospital. Plaintiff would be doubly compensated if she were allowed to have the use and benefit of the settlement amount and then also receive prejudgment interest on the full amount of the verdict.

2. Costs § 10 (NCI4th)— medical malpractice—costs—court's discretion

Defendant failed to demonstrate that the trial court exceeded its discretionary authority in awarding costs in a medical malpractice action.

3. Physicians, Surgeons, and Other Health Care Professionals § 96 (NCI4th)— medical malpractice—surgery—primary physician—vicarious liability for resident—directed verdict

The trial court did not err in a medical malpractice action by granting a directed verdict for plaintiff on the issue of defendant's vicarious liability for Dr. Pabst's negligence where the evidence was documentary and defendant did not deny the authenticity or correctness of those documents, so that the credibility of the evidence was manifest, and the evidence was sufficient to clearly establish defendant's vicarious liability. Defendant was a member of the faculty of the School of Medicine and had been granted clinical privileges, while Dr. Pabst was a fourth-year surgical resident at the hospital and did not have clinical privileges, and defendant controlled Dr. Pabst's manner of performance during the surgery in that he advised her to perform the action which ultimately led to the decedent's death.

Appeal by defendant from judgment entered 30 September 1996 by Judge Clifton W. Everett, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 13 January 1998.

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[128 N.C. App. 668 (1998)]

Faison & Gillespie, by O. William Faison and John W. Jensen, for plaintiff-appellee.

Walker, Barwick, Clark & Allen, L.L.P., by Thomas E. Barwick, for defendant-appellant.

WALKER, Judge.

This appeal arises from a medical malpractice action brought by plaintiff, administratrix of the estate for Mary Louise Brown (decedent), on 15 July 1994 against defendant Dr. Kenneth Michael Flowe. At all relevant times, defendant was employed as an instructor with the East Carolina University School of Medicine (School of Medicine). Further, the School of Medicine has an agreement with Pitt County Memorial Hospital (the Hospital) whereby the Hospital is utilized as the primary teaching hospital of the School of Medicine in the training and education of its medical students.

In her complaint, plaintiff alleges that on 29 July 1993 decedent was brought to the Hospital's emergency room complaining of upper abdominal pain, nausea and vomiting. She was diagnosed by defendant as suffering from acute gallbladder disease, and admitted under his care for surgery to remove her gallbladder.

On 3 August 1994 decedent was prepared for a laparoscopic cholecystectomy, whereby her gallbladder would be surgically removed by the use of a laparoscope. This procedure requires two or more physicians to perform the various steps. Defendant was the attending physician during this surgery, and he selected Dr. Susan Pabst (Dr. Pabst), a fourth-year surgical resident, to assist him.

A laparoscopic cholecystectomy involves the use of two instruments known as a trocar and a cannula. The trocar is a surgically sharp spike used to pierce the abdomen, and once entry is gained it is withdrawn. The cannula is a sealed metal tube in which the trocar is initially encased, and through which the laparoscope and other surgical instruments can be inserted once the trocar is removed.

The defendant's testimony at trial tended to show that after the initial incision was made near the center of the decedent's abdominal wall, the laparoscope was inserted into a cannula so that the procedure could be viewed from inside the abdomen. Next, a trocar was inserted into the upper left abdominal region by Dr. Pabst. As she was inserting this trocar, Dr. Pabst told defendant that she was encountering some resistance, and defendant advised her to use slow, steady

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pressure. As Dr. Pabst began to apply this pressure, the trocar slipped and pierced decedent's liver, producing a small amount of blood on the tissues below the liver. After vacuuming the visible blood and inspecting the areas around the liver for any reaccumulation of blood or the swelling or distension of any surrounding tissues, defendant continued the surgery by placing another trocar in the upper right abdominal region.

Within one to two minutes after the initial piercing of the liver, defendant was advised by the anesthesiologist that decedent's blood pressure had dropped drastically, from around 150 systolic to 50 systolic. Initially, defendant concluded that, given decedent's age and previous heart problems, the drop could have been attributable to cardiogenic shock. While the anesthesiologist was attempting to resuscitate the decedent and determine whether the drop was attributable to a heart condition, defendant left the operating room briefly to discuss the situation with decedent's family.

Upon his return, defendant was advised that the drop in decedent's blood pressure was not related to her heart condition. Defendant then began to make a large incision into decedent's abdomen in order to determine the source of the blood loss. At this time, defendant discovered a large amount of blood in the peritoneal cavity, the thin layer of tissue that lines the abdominal cavity. After determining that the pooled blood was arterial due to its bright red color, defendant proceeded to clamp the aortic artery in order to reduce further blood loss, and then looked for the source of the bleeding. However, despite defendant's efforts to resuscitate decedent, she died from severe blood loss after being in surgery for approximately four hours. The pathologist's report indicated that the probable cause of the blood loss was a tear in the celiac artery, a short artery located in the abdominal area.

On 22 June 1994, prior to filing this action, plaintiff entered into a settlement with the Hospital and Dr. Pabst. In consideration for the sum of \$178,486.76, plaintiff agreed to release those parties from all liability arising out of the events surrounding decedent's death. Thereafter, plaintiff instituted this action alleging that defendant was negligent in performing the surgery on decedent, and that he was vicariously liable for the negligent acts of the resident surgeon, Dr. Pabst.

At trial after plaintiff's evidence was presented, defendant's motion for a directed verdict was denied. At the close of all the evi-

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dence, plaintiff moved for a directed verdict on the issue of whether defendant was vicariously liable for the acts of Dr. Pabst under the doctrine of *respondeat superior*. After hearing arguments from both parties, the trial court granted plaintiff's motion. Thereafter, the jury returned a verdict finding defendant negligent and awarded damages to plaintiff in the amount of \$250,000.00. Subsequently, defendant's motion for a judgment notwithstanding the verdict (JNOV), or alternatively for a new trial, was denied by the trial court.

Following the jury verdict, the trial court ordered defendant to pay costs to plaintiff in the amount of \$42,101.44 for expenses incurred for such things as depositions, expert witness fees, travel expenses, counsel fees and the production of certain medical records. Further, the trial court ordered defendant to pay prejudgment interest, from the date the complaint was filed, on the entire \$250,000.00 verdict at the legal rate of 8% per annum, which amounted to \$43,018.70 in interest.

Defendant first contends the trial court erred by calculating the prejudgment interest before reducing the judgment by the amount of credit he was allowed as a result of plaintiff's prior settlement with the Hospital and Dr. Pabst. Next, he contends the trial court erred by taxing certain costs against him. And finally, he contends the trial court erred by directing a verdict as to his vicarious liability for Dr. Pabst's negligence.

[1] As to defendant's first assignment of error, he was entitled to a credit in the amount of \$178,486.76 as a result of plaintiff's settlement with the Hospital and Dr. Pabst pursuant to N.C. Gen. Stat. § 1B-4, which states:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater. . . .

N.C. Gen. Stat. § 1B-4(1) (1983). Therefore, we must determine whether the trial court should have calculated the prejudgment interest before or after applying this credit.

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The statutory provision allowing prejudgment interest is N.C. Gen. Stat. § 24-5, which provides in pertinent part:

(b) Other Actions.—In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

N.C. Gen. Stat. § 24-5 (b) (1991). An award of prejudgment interest promotes the following public policy goals: (1) it compensates a plaintiff for the loss of use value of a damage award due to a delay in payment; (2) it prevents the defendant from being unjustly enriched for the use value of the money due to the delay in payment; and, (3) it promotes the prompt settlement of claims. *Powe v. Odell*, 312 N.C. 410, 413, 322 S.E.2d 762, 764 (1984); *see also Baxley v. Nationwide Mutual Ins. Co.*, 334 N.C. 1, 430 S.E.2d 895 (1993) (where the court held that “[c]learly the purpose of the award is to compensate a worthy plaintiff for the loss of the use of money that he or she has incurred due to the wrongful acts of another party.” *Id.* at 8, 430 S.E.2d at 900).

Defendant argues that although this Court has recognized the principle that prejudgment interest must be taxed on the entire judgment, we have also stated that it should not be assessed against compensation for the same injury or damages already paid to plaintiff prior to judgment by a settling joint tortfeasor.

In support of this proposition, defendant cites this Court’s decision in *Beaver v. Hampton*, 106 N.C. App. 172, 416 S.E.2d 8, *disc. review allowed*, 332 N.C. 664, 424 S.E.2d 398 (1992), *vacated on other grounds*, 333 N.C. 455, 427 S.E.2d 317 (1993), where we dealt with prejudgment interest in the context of an automobile negligence action. Plaintiff was injured when his tractor-trailer truck was struck by defendant’s automobile. After plaintiff filed his claim, but prior to trial, defendant’s liability insurance carrier tendered its policy limit of \$25,000.00 and withdrew from the case. Thereafter, the jury returned a verdict in favor of plaintiff in the amount of \$30,000.00. After subtracting the prior settlement, plaintiff’s underinsured motorist carrier was required to pay \$5,000.00 plus prejudgment interest. However, in calculating the amount of interest, the trial court deducted the \$25,000.00 settlement and only awarded prejudgment interest on the remaining \$5,000.00. On appeal, this Court held that:

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[T]he trial court erred in failing to award prejudgment interest on the \$25,000 paid by the liability carrier from the filing date until it was paid by the liability carrier on 30 March 1989. Regarding the remaining \$5,000, prejudgment interest should be taxed from the date of filing to the time of judgment as a cost, less any interest already paid.

Id. at 179, 416 S.E.2d at 12; *see also Braddy v. Nationwide Mutual Liability Ins. Co.*, 122 N.C. App. 402, 470 S.E.2d 820, *disc. review denied and appeal dismissed*, 343 N.C. 749, 473 S.E.2d 610 (1996) (where plaintiff was injured as a result of a vehicle colliding with his motorcycle. Prior to filing his action, plaintiff received a settlement of \$50,000.00 from defendant's liability insurance carrier. Thereafter, plaintiff initiated suit against defendant and his UIM carrier and received a jury verdict in the amount of \$70,000.00. Although this Court did not consider the issue of prejudgment interest on appeal, it is apparent from the opinion that the trial court did not err in deducting the settlement from the jury verdict prior to assessing prejudgment interest. *Id.* at 405, 470 S.E.2d at 821).

We also find the decision in *Newby v. Vroman*, 14 Cal. Rptr. 2d 44 (Cal. Ct. App. 1992), to be instructive. There, a construction crane owned by plaintiff was damaged in an accident, and NCI, Incorporated (NCI) was hired to repair the damages. In turn, NCI hired defendant, a civil engineer, to make such repairs. Thereafter, while repairs were underway by defendant, the crane was damaged a second time. Plaintiff then filed a complaint against defendant and NCI to recover the damages allegedly caused by defendant's negligence. After the claim was filed, but before judgment was entered, NCI settled with plaintiff for \$30,000.00. Subsequently, a verdict for plaintiff in the amount of \$43,440.00 was entered. Plaintiff then moved the trial court to include prejudgment interest in the judgment.

In its award, the trial court calculated the total prejudgment interest on the entire judgment of \$43,440.00 and allowed plaintiff all such interest from the filing date until the settlement date. However, after the date of settlement, the trial court held that plaintiff was entitled to prejudgment interest only on \$13,440.00, the balance remaining after being reduced by the settlement.

In affirming the trial court's judgment, the California Court of Appeals held that in order to encourage the settlement of disputes, a plaintiff is entitled to prejudgment interest from the date of the tortious act proximately causing his or her injuries until the date a joint

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tortfeasor settles with the plaintiff. *Id.* at 48. However, after the date of settlement:

[T]he plaintiff is entitled to further prejudgment interest from the nonsettling defendants only on the remaining principal balance of the judgment after its reduction by such settlement amount. Were the rule otherwise, plaintiffs would clearly be doubly compensated by first receiving the use and benefit of a partial settlement sum, and thereafter obtaining the additional compensation of continuing prejudgment interest thereon from a nonsettling defendant.

Id.; see also *Casey v. State Farm Mut. Auto. Ins. Co.*, 464 N.W.2d 736 (Minn. Ct. App. 1991) (where the court held that “[p]rior to calculating prejudgment interest, collateral source payments must be deducted.” *Id.* at 739).

Here, prior to filing this action, plaintiff settled with the Hospital and Dr. Pabst for the sum of \$178,486.76. As noted by the California Court of Appeals, under these circumstances plaintiff would be “doubly compensated” if she were allowed to have the use and benefit of the settlement amount and then also receive prejudgment interest on the full amount of the \$250,000.00 verdict. Therefore, we conclude the trial court erred in awarding plaintiff prejudgment interest on the full amount of the verdict, and we remand the case for prejudgment interest to be assessed after applying a credit in the amount of the \$178,486.76 settlement to the verdict.

[2] Next, defendant contends the trial court erred by taxing certain costs that were not recoverable by plaintiff. Specifically, defendant contends the trial court erred by assessing expert witness fees for the testimony of three physicians since all three of these witnesses were called by plaintiff to prove identical facts in issue. Further, defendant argues that the trial court erred by taxing certain other costs against him that were not “reasonable and necessary.”

In this State, the trial court has the discretionary authority to assess costs pursuant to N.C. Gen. Stat. § 6-20 (1997). See *Parton v. Boyd*, 104 N.C. 422, 423, 10 S.E. 490, 490 (1889).

Here, defendant has failed to demonstrate that the trial court exceeded its discretionary statutory authority in awarding costs; therefore, we overrule this assignment of error. See *Campbell v. Pitt County Memorial Hosp.*, 84 N.C. App. 314, 328, 352 S.E.2d 902, 910

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(1987), *rev'd on other grounds*, *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990).

[3] Defendant's final assignment of error concerns the trial court's granting of a directed verdict as to the issue of his vicarious liability for Dr. Pabst's negligence.

In ruling on a motion for a directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50(a), the trial court must view the evidence in the light most favorable to the nonmovant and may grant the motion only if, as a matter of law, the evidence is insufficient to support a verdict in favor of the nonmovant. *West v. Slick*, 313 N.C. 33, 40, 326 S.E.2d 601, 605, 606 (1985). Further, when the moving party has the burden of proof, a directed verdict may be proper if (1) the credibility of the movant's evidence is manifest as a matter of law, and (2) the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn. *Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979).

Our Supreme Court has stated that a "review of the modern cases indicates three recurrent situations where credibility is manifest" as a matter of law: (1) where the nonmovant establishes the movant's case by admitting the truth of the basic facts upon which the movant's claim rests; (2) where the controlling evidence is documentary and the nonmovant does not deny the authenticity or correctness of the documents; and, (3) "[w]here there are only latent doubts as to the credibility of oral testimony and the opposing party has 'failed to point to specific areas of impeachment and contradictions.' " *Id.* at 537-538, 256 S.E.2d at 396 (citations omitted).

In this case, the evidence providing the basis for plaintiff's motion for a directed verdict was documentary, *i.e.* (1) the Pitt County Memorial Hospital Medical Staff Bylaws, Rules and Regulations (Medical Staff Bylaws); (2) the Bylaws of Pitt County Memorial Hospital, Inc. (Hospital Bylaws); and (3) the Affiliation Agreement Between the East Carolina University School of Medicine and the Pitt County Memorial Hospital (Affiliation Agreement). Further, the defendant has not denied the authenticity or correctness of these documents. Therefore, the credibility of plaintiff's documentary evidence was manifest.

We now turn to the issue of whether the evidence was sufficient to clearly establish defendant's vicarious liability. In *Rouse v. Pitt County Memorial Hospital*, 343 N.C. 186, 470 S.E.2d 44 (1996), our

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Supreme Court dealt with the issue of an attending physician's vicarious liability for the negligence of a resident when it announced:

"As a general rule, a physician who exercises due care is not liable for the negligence of nurses, attendants or interns who are not his employees." . . . However, "[o]ne who borrows another's employee may be considered a temporary [employer] liable in *respondeat superior* for the borrowed employee's negligent acts if [he] acquir[es] the same *right of control* over the employee as originally possessed by the lending employer."

Id. at 197, 470 S.E.2d at 51 (emphasis in original) (citations omitted). Further, the Court elaborated on the "borrowed employee" doctrine by stating:

Whether a[n] [employee] furnished by one person to another becomes the employe[e] of the person to whom he is loaned [depends on] whether he passes under the latter's right of control with regard not only to the work to be done *but also to the manner of performing it.* . . . A[n] [employee] is the employe[e] of the person who has the *right* of controlling the manner of his performance of the work, irrespective of whether he actually exercises that control or not.

Id. (emphasis in original) (citations omitted).

In addressing whether the attending physician had the right to control the resident physician, the Court was presented with the same documents on which plaintiff now relies—the Medical Staff Bylaws, the Hospital Bylaws, and the Affiliation Agreement. The Court summarized these documents as follows:

Paragraph C of the [Affiliation Agreement] provides that "medical students and house staff shall be responsibly involved in patient care under the supervision of the Dean and the faculty of the School of Medicine." The [Medical Staff Bylaws] specify that "a patient may be admitted to the hospital only by a member of the medical staff." The [Hospital Bylaws] provide that "[o]nly a licensed physician with clinical privileges shall be directly responsible for a patient's diagnosis and treatment." Paragraph H of the [Medical Staff Bylaws] provides that "the house staff officer will only practice under the direction of the department chairman or his delegate. Each chairman is finally responsible for the action of the house staff officers in his department."

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Id. at 200, 470 S.E.2d at 52-53. The Court then concluded by stating:

While there is evidence in the record that the Hospital retained the authority to hire, pay, discipline, and terminate the resident physicians and the ultimate authority to grant hospital privileges to residents to perform certain tasks . . . , there is also evidence that tends to show that the Hospital delegated the right to control the resident physicians' *manner* of performance related to the provision of medical services to patients exclusively to the ECU School of Medicine's department chairperson or his delegates (i.e., ECU faculty attending physicians who had been granted clinical privileges at the Hospital), thereby allowing the resident physicians' negligence to be imputed to the attending physicians.

Id. at 201, 470 S.E.2d at 53 (emphasis in original).

Here, defendant was a member of the faculty at the School of Medicine and had been granted clinical privileges at the Hospital. Conversely, Dr. Pabst was a fourth-year surgical resident at the Hospital, and did not have clinical privileges. In addition, the evidence indicates the defendant controlled Dr. Pabst's "manner of performance" during the surgery, in that he advised her to apply steady pressure to insert the trocar into decedent's abdomen, an action which ultimately led to her death. Therefore, based on the reasoning of the *Rouse* Court, defendant was vicariously liable for any negligent acts of Dr. Pabst. As such, the trial court did not err by granting plaintiff's motion for a directed verdict on this issue, and this assignment of error is overruled.

In conclusion, we affirm the trial court's taxing of certain costs against defendant, as well as its granting of a directed verdict as to his vicarious liability for Dr. Pabst's negligence. Further, we reverse the trial court's award of prejudgment interest and remand the case for the assessment of prejudgment interest on the verdict after first applying a credit in the amount of the \$178,486.76 settlement.

Affirmed in part, reversed in part and remanded.

Judges EAGLES and WYNN concur.

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DAYLENE PAGE, ELSIE CLAY, ADA FARRAR AND JAMES LASTER, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED IN THE COMMUNITY OF FELTONSVILLE, WAKE COUNTY, NORTH CAROLINA, PLAINTIFFS v. ROSCOE, LLC, A LIMITED LIABILITY COMPANY, DALE C. BONE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, AND THE TOWN OF APEX, DEFENDANTS

No. COA97-286

(Filed 3 March 1998)

1. Pleadings § 63 (NCI4th)— Rule 11 sanctions—reasonable inquiry into facts and law—sanctions reversed

The portion of an order imposing Rule 11 sanctions on plaintiffs and plaintiffs' attorney as to defendant Roscoe was reversed where plaintiffs' complaint, supported by an affidavit, contained sufficient allegations susceptible of proof that defendant's gas storage facility will result in an anticipated nuisance when it becomes operational. Plaintiffs' attorney made an objectively reasonable inquiry into the facts and existing law by obtaining an expert opinion which supports plaintiffs' allegations and in his reliance on a North Carolina Supreme Court opinion.

2. Pleadings § 63 (NCI4th)— Rule 11 sanctions—improper purpose—no evidence

There was no violation of the improper purpose prong of Rule 11 where there was no evidence that plaintiffs filed their complaint for any improper purpose and the trial court did not make any findings in this regard, but merely concluded that such an improper purpose existed.

3. Pleadings § 63 (NCI4th)— Rule 11 sanctions—action against individual member of limited liability company—not well grounded in law

The portion of an order imposing Rule 11 sanctions on plaintiffs and their attorney as to defendant Bone was remanded for further consideration of appropriate sanctions where no acts by Bone individually were properly alleged. Under N.C.G.S. § 57C-3-30, it was improper to name an individual member of a limited liability company as a party defendant without any evidence to support it and the naming of Bone was not well grounded in law. Defendant's counsel conceded at oral argument that naming Bone as an individual defendant did not require additional time and research beyond that required to assert defenses and other arguments on

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behalf of Roscoe and the matter was remanded for determination of what sanctions, if any, are appropriate.

Appeal by plaintiffs from order entered 30 September 1996 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 19 November 1997.

Conrad A. Airall for plaintiffs-appellants.

Narron, Holdford, Babb, Harrison & Rhodes, P.A., by I. Joe Ivey and Henry C. Babb, Jr., for defendants-appellees Roscoe, LLC and Dale C. Bone.

WALKER, Judge.

On 12 August 1994, defendant Roscoe, LLC (Roscoe) purchased approximately two acres of land in the Community of Feltonsville near the Town of Apex (the Town). On 3 January 1995, the Town approved a site plan submitted by Roscoe for the construction and operation of a propane gas bulk storage and distribution facility, which is a permitted use under the zoning ordinance. Thereafter, grading and site preparation was begun. This two acres of land was re-zoned from Residential-Agricultural to Industrial-2 in 1987 as part of the Town's Comprehensive Land Use Plan even though the surrounding properties were zoned residential-agricultural at the time.

On 11 April 1995, plaintiffs filed a complaint against defendants Roscoe and Dale C. Bone (Bone), a member of Roscoe, alleging that a gas storage facility, if constructed, would constitute a nuisance. Plaintiffs allege the gas storage facility will be located in close proximity to their homes and would be located within 100 feet of plaintiff Daylene Page's home. Plaintiffs further alleged that the defendant Town of Apex engaged in racial discrimination by refusing to consider the objections of the plaintiffs. This complaint was signed by plaintiffs' attorney, Conrad Airall and verified by plaintiffs Daylene Page, Elsie Clay, Ada Farrar and James Laster. Plaintiffs subsequent application for a temporary restraining order (TRO) to enjoin the Town from issuing a building permit was denied. Plaintiffs then sought a preliminary injunction which was denied on 5 May 1995.

Plaintiffs dismissed with prejudice all claims after reaching a settlement with the Town on 8 August 1995. Plaintiffs later dismissed all claims against Roscoe and Bone on 19 December 1995. Subsequently, on 9 April 1996, Roscoe and Bone moved for Rule 11 sanctions includ-

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ing attorney's fees. On 30 September 1996, the trial court imposed Rule 11 sanctions against plaintiffs and plaintiffs' counsel, ordering them to pay attorney's fees in the amount of \$13,065 and costs of \$98.50.

[1] Plaintiffs first argue that the trial court erred in finding that the complaint filed against Roscoe and Bone was not well grounded in fact or law and was filed for the improper purpose of hindering, delaying and preventing the operation of a lawful business enterprise in violation of Rule 11.

N.C. Gen. Stat. § 1A-1, Rule 11 (1990) provides in part:

(a) *Signing by Attorney.*- Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

"This Court exercises de novo review of the question of whether to impose Rule 11 sanctions. If we determine that the sanctions were warranted, we must review the actual sanctions imposed under an abuse of discretion standard." *Dodd v. Steele*, 114 N.C. App. 632, 635,

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442 S.E.2d 363, 365, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 521 (1994) (citations omitted).

The Rule 11 analysis contains three parts: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose. "A violation of any one of these requirements mandates the imposition of sanctions." *Id.*

"To satisfy the legal sufficiency requirement, the disputed action must be warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *Id.* The two-step analysis required in determining legal sufficiency is as follows:

[T]he court must first determine the facial plausibility of the paper. If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper. If the paper is not facially plausible, then the second issue is (1) whether the alleged offender undertook a reasonable inquiry into the law, and (2) whether, based on the results of the inquiry, formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed. If the court answers either prong of this second issue negatively, then Rule 11 sanctions are appropriate.

McClerin v. R-M Industries, Inc. 118 N.C. App. 640, 643-44, 456, S.E.2d 352, 355 (1995). Our Supreme Court has interpreted "reasonable inquiry" to mean the following:

i[f], given the knowledge and information which can be imputed to a party, a reasonable person under the same or similar circumstances would have terminated his or her inquiry and formed the belief that the claim was warranted under existing law, then the party's inquiry will be deemed objectively reasonable.

Jerry Bayne, Inc. v. Skyland Industries, Inc., 108 N.C. App. 209, 214, 423 S.E.2d 521, 523 (1992), *affirmed*, 333 N.C. 783, 430 S.E.2d 266 (1993) (*quoting Bryson v. Sullivan*, 330 N.C. 644, 661-62, 412 S.E.2d 327, 336 (1992)). Moreover, "the reasonableness of the belief that it [the document] is warranted by existing law should be judged as of the time the document was signed." *Id.* at 215, 423 S.E.2d at 524. Responsive pleadings are not to be considered. *Bryson*, 330 N.C. at 656, 412 S.E.2d at 333.

Further, when analyzing the factual sufficiency of a complaint, the court must determine the following:

(1) whether the plaintiff undertook a reasonable inquiry into the facts and (2) whether the plaintiff, after reviewing the results of

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his inquiry, reasonably believed that his position was well grounded in fact.

McClerin, 118 N.C. App. at 644, 456 S.E.2d at 355 (*citing Higgins v. Patton*, 102 N.C. App. 301, 306, 401 S.E.2d 854, 857 (1991). See also *Brown v. Hurley*, 124 N.C. App. 377, 477 S.E.2d 234 (1996).

Prior to filing their complaint, plaintiffs obtained an affidavit from Kenneth O. Beatty, Jr., Ph.D., P.E., a chemical engineer, stating the dangers of a gas storage facility, particularly when located in close proximity to a residential area. Beatty's affidavit included the following:

13. In a distribution facility where thousands of gallons are transferred each day from one storage vessel to another, there always exists the possibility of a serious spill of liquid.

14. Dangers associated with handling liquid propane are reported in literature with which I am familiar. The literature warns of the possibility of rupture of storage cylinders in the event of back-flow in transfer piping between one vessel and another. Due to the constant pressure under which the gas must be kept to keep it in liquid form, back-flow prevention devices must be installed and operating properly to protect cylinders from such rupture and potential explosion. Such devices may be reliable but can fail like any other piece of mechanical equipment.

...

16. Based on my expertise as a chemical engineer, my direct knowledge of propane explosion results, and my knowledge of the literature on the subject, it is my opinion that the potential hazard to the surrounding areas of a facility such as the one proposed is so great that a propane distribution plant should not be located in the near vicinity of a residential area.

Plaintiffs' complaint included the following allegations:

37. Plaintiffs believe and thus allege that locating the propane storage facility in such close proximity to Plaintiffs' homes poses a substantial hazard to the health and safety of all residents of the Community.

...

41. The 30,000 gallon liquid propane storage facility erected in the residential area of the Community will pose a severe threat to the

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health and safety of the occupants of Plaintiff Daylene Page's property and to the health and safety of the Feltonsville Community in general.

42. Plaintiffs believe and thus allege that the permanent storage facility will be located within less than 100 feet of Plaintiff Daylene Page's house . . . and will be [located] within less than one mile of the homes in the residential area of the Community.

43. Plaintiffs believe and thus allege that the actions of defendants Roscoe and Bone in preparing the two-acre parcel for the placement of Liquid propane thereon, and the actual erection of the said facility have interfered, and will continue to interfere with Plaintiffs' use and enjoyment of their property constituting a private nuisance by Defendant Roscoe and Bone. By virtue of this nuisance Plaintiff Daylene Page and all other Plaintiffs residing in close proximity to the facility will suffer various types of illnesses associated with ingesting propane and other chemical compounds; and will be exposed to the risk of fire and explosion.

. . .

59. In order to fully compensate Plaintiffs, in order to prevent future harm from the likely or possible spread of chemical contaminants, noxious gases, diesel exhaust emissions, and explosion and fire, and in order to protect the public, including Plaintiffs and the residents of the Community f[rom] the potential harms to human health and the environment resulting from the presence of the storage facility and otherwise in the interest of equity, public policy, and justice, plaintiffs are entitled to injunctive relief enjoining Defendants from erecting the liquid propane storage facility on the two-acre parcel.

The trial court found that "the legality of the Industrial-2 zoning had previously been litigated by the Plaintiffs . . . [and] that the LP gas bulk storage facility was a permitted use under the zoning ordinance and Land Use Plan for the City of Apex." Plaintiffs objected to the re-zoning of the property to I-2 in 1987. While it is correct that they did not "appeal" from the re-zoning action by the Town, there is nothing in the record to suggest that a gas storage facility would be located on the property. In fact, defendant Roscoe did not acquire the property until 1994.

The defendants argue that there is no precedent in this State which would support a cause of action based on nuisance per acci-

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dens as to the proposed development of an otherwise lawful business operation.

The trial court, obviously persuaded by this argument, made the following finding:

the allegations of . . . the Complaint stating that the named Defendants committed a private nuisance as of April 11, 1995, entitling Plaintiffs to recover substantial damages from the Defendants is based upon conjecture and speculation since a lawful business can only constitute a private nuisance per accidens if it is operated in an unlawful manner and otherwise interferes with the use and enjoyment of the Plaintiff's property.

However, plaintiffs cite *Hooks v. International Speedways, Inc.*, 263 N.C. 686, 140 S.E.2d 387 (1965), where our Supreme Court stated the following principle of law with respect to an anticipated nuisance:

It is well settled that a court of equity may, under proper circumstances, enjoin a threatened or anticipated nuisance. Courts are reluctant to interfere by injunction in a legitimate business enterprise. Where the thing complained of is not a nuisance *per se*, but may or may not become a nuisance, according to the circumstances, and the injury apprehended is merely eventual or contingent, equity will not interfere. 'Where it is sought to enjoin an anticipated nuisance, it must be shown (a) that the proposed construction or the use to be made of the property will be a nuisance *per se*; (b) or that, while it may not amount to a nuisance *per se*, under the circumstances of the case a nuisance must necessarily result from the contemplated act or thing. . . . The injury must be actually threatened, not merely anticipated; it must be practically certain, not merely probable. . . . The mere apprehension of a nuisance is insufficient to warrant equitable relief, and in order to restrain future acts with respect to the use of a proposed building, it is necessary to set forth facts which show with reasonable certainty that such result would likely follow.'

Hooks, 263 N.C. at 690-91, 140 S.E.2d at 391 (citations omitted).

In *Hooks*, the plaintiffs (officers and trustees of Smyrna Baptist Church), after receiving a restraining order, sought to permanently enjoin defendant's construction and operation of an automobile race track which would be located 2,500 feet from their rural church. *Hooks*, 263 N.C. at 690, 140 S.E.2d at 390. Plaintiffs alleged that the

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“ ‘speedway would be used particularly on Sundays . . . ; ‘operation of a race track as threatened by defendants creates noise which can be heard for miles away,’ ‘the noise from automobile engines and squealing tires will completely disrupt any service being held at Smyrna Church.’ ” *Id.* at 693, 140 S.E.2d at 393. Our Supreme Court found that these “allegations of fact [were] susceptible of proof” and were sufficient to uphold the trial court’s continuance of the restraining order until the final hearing on the merits. *Id.*

In view of the rule in *Hooks*, the trial court’s conclusion that “a lawful business can only constitute a private nuisance per accidens if it is operated in an unlawful manner . . . ” is erroneous.

The trial court based its findings and conclusions on the premise that at the time the complaint was filed, defendants were engaged in a lawful business enterprise and had complied with all existing regulations; therefore, its activity could not constitute a nuisance. Here, plaintiffs alleged in their complaint that heavy trucks will be entering and exiting the gas storage facility; the loading and unloading of these trucks will increase the likelihood of gas escaping; the increase in truck traffic will result in loud noise, congestion and vehicular accidents; this facility will pose a hazard to the health and safety of the plaintiffs and therefore interfere with the use and enjoyment of their property; and that plaintiff Daylene Page’s house will be within 100 feet of this facility. Plaintiffs argue that even though the defendant’s gas storage facility may not constitute a nuisance *per se*; nevertheless, their allegations are susceptible of proof that a nuisance will otherwise result from its operation.

As to the sufficiency of the allegations, the Court also stated in *Hooks*, “[w]hether plaintiffs will be able to make satisfactory proof at the trial upon the merits, does not concern us here.” *Hooks*, 263 N.C. at 693, 140 S.E.2d at 393. Likewise, we are not confronted with determining whether plaintiffs would have been able to prove the gas facility was a nuisance under these circumstances or the fact that plaintiffs’ requests for both a TRO and preliminary injunction were denied. We note our inquiry is distinguished from that in *Hooks* where the issue was the sufficiency of allegations in the complaint so as to entitle the plaintiffs to a continuing restraining order until a final hearing on the merits. Instead, we focus on whether the complaint, at the time it was filed, was factually and legally sufficient to withstand Rule 11 sanctions.

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After careful review, we find that plaintiffs' complaint, supported by Beatty's affidavit, contains sufficient allegations which are susceptible of proof that defendant's gas storage facility will result in an anticipated nuisance when it becomes operational. As such, we find that plaintiffs made a reasonable inquiry into the facts and determined that their position was well grounded in fact. We further find that plaintiffs undertook a reasonable inquiry into the law and formed a reasonable belief that the complaint was warranted by existing law. It is evident that plaintiffs' attorney made an "objectively reasonable" inquiry into the facts and existing law by the obtaining of Beatty's expert opinion which supports plaintiffs' allegations of an anticipated nuisance and in his reliance on *Hooks*.

[2] Finally, we must determine whether the plaintiffs' complaint was interposed for an improper purpose in violation of Rule 11.

This Court in *Brown v. Hurley*, 124 N.C. App. 377, 382, 477 S.E.2d 234, 238 (1996), stated:

Even if a complaint is well-grounded in fact and in law, it may nonetheless violate the improper purpose prong of Rule 11. An improper purpose is "any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." In other words, a party "will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents or cause them unnecessary cost or delay." An objective standard is used to determine the existence of an improper purpose, with the burden on the movant to prove such improper purpose.

(Citations omitted).

We find no evidence which would suggest that the plaintiffs here filed their complaint for any improper purpose. Moreover, the trial court did not make any findings in this regard, but merely concluded that such an improper purpose existed. Therefore, we find no violation of the improper purpose prong of Rule 11.

[3] The trial court also found that:

The actions of the Plaintiff and their Attorney of Record in naming the Defendant, Dale C. Bone, as an individual party defendant in this Complaint were contrary to North Carolina law in that N.C.G.S. § 57C-3-30(b) prohibits the naming of a member of a limited liability company as a party to proceedings by or against a limited liability company. Moreover, the Complaint does not

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allege any acts on the part of Dale C. Bone individually, which are not related to his status as a member of a North Carolina limited liability company and would justify the naming of Bone as an individual party Defendant.

The court then concluded that the improper naming of Bone as an individual party defendant "violates Rule 11 of the North Carolina Rules of Civil Procedure in that the allegations are not well founded in fact or law and taken for the improper purpose of hindering, delaying and preventing the operation of a lawful business enterprise by Roscoe, L.L.C."

While we do not find that the allegations were not well-grounded in fact or were taken for an improper purpose, we do find that the allegations against Bone individually are not well-grounded in law.

N.C. Gen. Stat. § 57C-3-30 (1993) provides in pertinent part:

- (a) A person who is a member or manager, or both, of a limited liability company is not liable for the obligations of a limited liability company solely by reason of being a member or manager or both, and does not become so by participating, in whatever capacity, in the management or control of the business. A member or manager may, however, become personally liable by reason of his own acts or conduct.
- (b) A member of a limited liability company is not a proper party to proceedings by or against a limited liability company, except where the object of the proceeding is to enforce a member's right against or liability to the limited liability company.

The record sustains the trial court's conclusion that no acts by Bone, individually, were properly alleged. Therefore, under the above statute, it was improper to name an individual member of a limited liability company as a party defendant without any evidence to support it. As such, the naming of Bone as an individual defendant was not well-grounded in law and therefore a violation of Rule 11. Even though defendant's counsel conceded at oral argument that the naming of Bone as an individual defendant did not require additional time and research beyond what was required to assert defenses and other legal arguments on behalf of Roscoe, it is for the trial judge to determine what sanctions, if any, are appropriate here. We remand for consideration by the trial court of an appropriate sanction based on the record or further evidence.

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In summary, we conclude that the plaintiffs' complaint, as against defendant Roscoe, did not violate either the factual sufficiency, legal sufficiency or the improper purpose prongs of Rule 11. The portion of the order of the trial court imposing Rule 11 sanctions on plaintiffs and plaintiffs' attorney, jointly and severally, as to defendant Roscoe, is reversed. The portion of that order imposing sanctions on plaintiffs and plaintiffs' attorney, jointly and severally, as to defendant Bone, is remanded for further consideration consistent with this opinion.

Reversed in part and remanded.

Chief Judge ARNOLD and Judge LEWIS concur.

STATE OF NORTH CAROLINA v. HULON LEON WILSON, JR.

No. COA96-1469

(Filed 3 March 1998)

1. Appeal and Error § 163 (NCI4th)— kidnapping indictment—felonious restraint conviction—indictment insufficient for conviction—failure to object

Defendant's failure to object to the submission of felonious restraint to the jury on an indictment for first-degree kidnapping was not an impediment to appeal because defendant challenged the indictment on the grounds that it was on its face insufficient to support the offense of which he was convicted.

2. Indictment, Information, and Criminal Pleadings § 3 (NCI4th)— kidnapping indictment—felonious restraint instruction requested—right to challenge indictment not waived

Defendant did not waive his right to challenge the sufficiency of an indictment for first-degree kidnapping to support a conviction for felonious restraint by requesting the instruction on felonious restraint. Under N.C.G.S. § 15A-642(c), waiver of indictment must be in writing and signed by defendant and his attorney.

3. Indictment, Information, and Criminal Pleadings § 18 (NCI4th)— first-degree kidnapping indictment—felonious restraint conviction—lesser offense—required allegations

A first-degree kidnapping indictment which did not allege that defendant transported the victim by motor vehicle or other

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conveyance was insufficient to support a charge of felonious restraint and the court erred by submitting that charge to the jury as a possible verdict. The legislature has not adopted a short form indictment for kidnapping and, although the legislature has expressly declared that felonious restraint is a lesser included offense of kidnapping, a statute which simply authorizes a verdict to a lesser offense upon trial on a greater offense does not eliminate the requirement that every essential element of the lesser charge be alleged in the indictment. N.C.G.S. § 14-43.3.

4. Constitutional Law § 219 (NCI4th)— kidnapping indictment—felonious restraint conviction—indictment insufficient—new indictment for felonious restraint—double jeopardy

A judgment upon a conviction for felonious restraint upon an indictment for first-degree kidnapping which did not allege the essential element of transportation by motor vehicle or other conveyance was remanded for judgment and sentencing for false imprisonment. Under double jeopardy, the State cannot now seek to indict and try defendant for felonious restraint; however, the verdict of felonious restraint means that the jury found each of the elements of false imprisonment.

Appeal by defendant Hulon Leon Wilson, Jr. from judgment entered 22 May 1996 by Judge Howard E. Manning, Jr., in Durham County Superior Court. Heard in the Court of Appeals 28 August 1997.

*Michael F. Easley, Attorney General, by Charles J. Murray,
Special Deputy Attorney General, for the State.*

Brian Michael Aus, for defendant Hulon Leon Wilson, Jr.

WYNN, Judge.

“[W]hen a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense [only] when the greater offense which is charged in the bill of indictment contains all of the essential elements of the lesser.”¹ Felonious restraint, a lesser included offense of kidnapping, requires proof that the

1. *State v. Hunter*, 299 N.C. 29, 38, 261 S.E.2d 189, 195 (1980); see also *State v. Jones*, 110 N.C. App. 289, 292, 429 S.E.2d 410, 412 (1993).

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victim was transported in a motor vehicle or other conveyance.² Because the kidnaping indictment in the subject case fails to charge that the defendant transported the victim by motor vehicle or other conveyance, we must vacate his conviction on the lesser included offense of felonious restraint. However, we remand to the trial court for imposition of judgment of the lesser included offense of false imprisonment which does not require proof of transportation by motor vehicle or other conveyance.

Facts

As a result of an incident which occurred on November 14, 1995, defendant was indicted and tried on May 21, 1996 in the Superior Court of Durham County for first degree kidnaping and assault. At the conclusion of the trial, defendant was acquitted of the assault charge but convicted of felonious restraint, which was submitted to the jury as a lesser included offense under the kidnaping indictment. The trial court sentenced defendant to an active sentence of twenty-five (25) to thirty (30) months imprisonment.

Preliminary Issues

Before we discuss the merits of our decision today, certain litigation facts in this case constrain us to address the preliminary question of whether this issue was properly preserved for our appellate review.

[1] According to the record, defendant in this case did not object to the trial court's submission of felonious restraint to the jury. In fact, during the charge conference, defense counsel asked the court to consider submitting felonious restraint as well as second degree kidnaping and false imprisonment as possible verdicts. Ordinarily, under the invited error doctrine, such action and inaction by defendant would prevent him from now seeking appellate review of the contested issues.³ However, defendant argues that, inasmuch as the indictment in this case is subject to a motion in arrest of judgment and he did not formally waive his right to an indictment, the issue regarding the trial court's submission of the felonious restraint charge to the jury is preserved as a matter of law. We agree.

2. See N.C. Gen. Stat. § 14-43.3 (1995).

3. See N.C. Gen. Stat. § 15A-1443(c) (1988) ("A defendant is not prejudiced . . . by error resulting from his own conduct.").

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Where there is a fatal defect in the indictment, verdict or judgment which appears on the face of the record, a judgment which is entered notwithstanding said defect is subject to a motion in arrest of judgment.⁴ A defect in an indictment is considered fatal if it "wholly fails to charge some offense . . . or fails to state some essential and necessary element of the offense of which the defendant is found guilty."⁵ When such a defect is present, it is well established that a motion in arrest of judgment may be made at any time in any court having jurisdiction over the matter, even if raised for the first time on appeal.⁶ As the indictment in the subject case is being challenged by defendant on the grounds that it is on its face, insufficient to support the offense of which defendant was convicted, we conclude that defendant's failure to object to the submission of the felonious restraint charge is not an impediment to this appeal since such a challenge of the indictment may be made for the first time on appeal.

[2] Having concluded that defendant's failure to object is not fatal to his appeal, we now consider whether defendant, nonetheless, waived his right to challenge the sufficiency of the indictment under which he was convicted by requesting an instruction on felonious restraint. In addressing this issue, we refer to N.C. Gen. Stat. § 15A-642(c) which provides that:

Waiver of indictment must be in writing and signed by the defendant and his attorney. The waiver must be attached to or executed upon the bill of indictment.

We also find it instructive that our courts, in applying N.C.G.S. § 15A-642(c), have held that neither a tendering of a guilty plea by a defendant,⁷ nor the tendering to the trial court of an unsigned waiver,⁸ could be considered sufficient waivers of a defendant's right to a formal indictment. Guided by such precedent and the plain language of the statute itself, we conclude that defendant's request for an instruction on felonious restraint did not constitute a formal waiver of his right to be charged under a sufficient indictment. Accordingly, we

4. *State v. Davis*, 282 N.C. 107, 117, 191 S.E.2d 664, 670 (1972).

5. *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943).

6. *State v. Wallace*, 25 N.C. App. 360, 362, 213 S.E.2d 420, 422 (1975); *State v. McGaha*, 306 N.C. 699, 702, 295 S.E.2d 449, 451 (1982); *State v. Sellers*, 273 N.C. 641, 645, 161 S.E.2d 15, 18 (1968).

7. *State v. Brown*, 21 N.C. App. 87, 88, 202 S.E.2d 798 (1974).

8. *State v. Neville*, 108 N.C. App. 330, 333, 423 S.E.2d 496, 497 (1992).

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now address the merits of defendant's argument that the indictment charging him with first degree kidnaping was insufficient to support defendant's conviction of felonious restraint.

Discussion

[3] North Carolina courts have long held that in making out an indictment or criminal summons, the state need only allege ultimate facts.⁹ Evidentiary matters simply need not be alleged.¹⁰ However, it is also well settled in this state that "when a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense [only] when the greater offense which is charged in the bill of indictment contains all of the essential elements of the lesser."¹¹ Thus, when the lesser charge has an essential element not alleged in the bill of indictment charging the greater offense,¹² no conviction may be had on the lesser offense.

The above rule governs when determining the sufficiency of an indictment, unless the legislature has authorized the state to use short-form indictments for the crime in question.¹³ Only when such authorization is given is the state exempt from the common law rule that it must allege every element of the lesser included charge in order to obtain a conviction pursuant to an indictment charging the greater offense.¹⁴ As of yet, the legislature has not adopted a short form indictment for the crime of kidnaping.¹⁵ Therefore, in determining the sufficiency of the indictment in the subject case, we are compelled to follow the general common law rule that the state must allege every element of a lesser included offense in order to obtain a conviction under an indictment charging the greater offense.

The body of the indictment in this case charged that defendant did

"kidnap Trenda Jean Wilson, a person who had attained the age of 16 years of age, by unlawfully confining and removing her from

9. *State v. Coker*, 312 N.C. 432, 437, 323 S.E.2d 343, 348 (1984).

10. *Id.* (citing *State v. Palmer*, 293 N.C. 633, 239 S.E.2d 406 (1977)).

11. *State v. Hunter*, 299 N.C. 29, 38, 261 S.E.2d 189, 195 (1980); see also *State v. Jones*, 110 N.C. App. 289, 292, 429 S.E.2d 410, 412 (1993).

12. *State v. Overman*, 269 N.C. 454, 464, 153 S.E.2d 44, 54 (1967).

13. See e.g. N.C. Gen. Stat. § 15-144 through 144.2 (1983).

14. *State v. Jerrett*, 309 N.C. 239, 259, 307 S.E.2d 339, 350 (1983).

15. *Id.*

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one place to another, without her consent and for the purpose of holding her hostage and terrorizing her and the defendant did not release Treda Jean Wilson in a safe place."

(emphasis added). The offense of kidnaping is defined in N.C. Gen. Stat. § 14-39 as follows:

- (a) Any person who shall unlawfully confine, restrain, or remove any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnaping if such confinement, restraint or removal is for the purpose of:
 - (1) Holding such other person for a ransom or as a hostage or using such person as a shield; or
 - (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
 - (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or
 - (4) Holding such other person in involuntary servitude in violation of G.S. § 14-43.2.

The lesser included offense of felonious restraint, of which defendant was convicted, is defined in N.C. Gen. Stat. § 14-43.3 as follows:

A person commits the offense of felonious restraint if he unlawfully restrains another person without that person's consent, or the consent of the person's parent or legal guardian if the person is less than 16 years old, and moves the person from the place of initial restraint by transporting him in motor vehicle or other conveyance. Violation of this section is a Class F felony. Felonious restraint is considered a lesser included offense of kidnaping.

(emphasis added).

The difference between the greater offense of kidnaping and the lesser included offense of felonious restraint is clear from the language of the cited criminal statutes. In addition to not requiring the specified purpose or intent outlined in the kidnaping statute, the offense of felonious restraint contains an element not contained in the crime of kidnaping-transportation by motor vehicle or other conveyance. In fact, it is this element which distinguishes felonious

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restraint from another lesser included offense of kidnaping, false imprisonment. False imprisonment, like felonious restraint, contains all of the elements of kidnaping, except for the requirement that there be an intent to confine, restrain, or remove another person.¹⁶ Unlike felonious restraint, however, the offense of false imprisonment does not include the element of transportation by motor vehicle or other conveyance.

Given the plain language of the felonious restraint statute and the distinction between the offenses of kidnaping, felonious restraint and false imprisonment, we conclude that, absent authorization by the legislature of a short-form indictment, transportation by motor vehicle or other conveyance is an essential element of the crime of felonious restraint that must be alleged by the State in a bill of indictment in order to properly indict a defendant for that crime. In our view, the State's decision to allege that the defendant transported the victim by motor vehicle or other conveyance relates not to an evidentiary matter or a theory of the trial, but rather, it relates to the State's decision as to what *offense* to proceed upon.¹⁷ As such, the defendant in this case could not have lawfully been convicted of the crime of felonious restraint upon his trial on the kidnaping indictment since the indictment here did not allege that the defendant transported the victim by motor vehicle or other conveyance.

In its brief, the state argues that for this court to reach such a conclusion would serve to circumvent the legislature's express proclamation in N.C.G.S. § 14-43.4 that the offense of felonious restraint is a lesser include offense of kidnaping. The State contends that the legislature, by expressly declaring that felonious restraint is a lesser included offense of kidnaping, effectively relieved it of its common law burden of having to specifically allege that the defendant transported the victim by motor vehicle or other conveyance. We disagree.

A line of North Carolina Supreme Court cases involving short-form murder indictments support this Court's conclusion. The first of

16. See *State v. Claypoole*, 118 N.C. App. 714, 717, 457 S.E.2d 322, 324 (1995); see also *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 562 (holding that the difference between kidnaping and the lesser included offense of false imprisonment is the purpose of the confinement, restraint or removal, such that if the unlawful restraint occurs without any of the purposes specified in the kidnaping statute, the offense is false imprisonment).

17. See *Coker*, 312 N.C. at 437, 323 S.E.2d at 348.

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these cases is *State v. Rorie*, 252 N.C. 579, 114 S.E.2d 233 (1960). In *Rorie*, the defendant was tried on an indictment charging him with murder using the statutorily authorized short-form indictment. The jury subsequently acquitted him of murder and convicted him of felonious assault. After reciting the provisions of N.C.G.S. § 15-169 (providing that when a defendant charged with any felony involving an assault upon the person the jury may acquit on the felony charged and convict defendant of the assault) and N.C.G.S. § 15-170 (providing that a defendant may be convicted of a lesser degree of the offense charged in the indictment or of attempt), our Supreme Court concluded that:

[n]otwithstanding the provisions of the above statutes, when it is sought to fall back on the lesser offense of assault and battery or assault with a deadly weapon, in case the greater offense, murder or manslaughter, is not made out, the indictment for murder should be so drawn as necessarily to include an assault and battery or assault with a deadly weapon, or it should contain a separate count to that effect.

Rorie, 252 N.C. at 581, 114 S.E.2d at 235 (citations omitted). The court then went on to hold that, because the form of the indictment charged an offense of which assault with a deadly weapon may or may not have been an ingredient, the bill of indictment was insufficient to support a verdict of felonious assault. *Id.* at 582, 114 S.E.2d at 235.

Following in line with its decision in *Rorie*, the court in both *State v. Whiteside*, 325 N.C. 389, 383 S.E.2d 911 (1989) and *State v. Gibson*, 333 N.C. 29, 424 S.E.2d 95 (1992) rejected the defendants' contention that the trial courts in each of their murder cases erred by refusing to give jury instructions on the lesser included offense of felonious assault. In addressing the defendant's contention in *Whiteside*, the court held that the murder indictment under consideration was insufficient to support an assault verdict, despite the fact that the state had used a short-form indictment. *Whiteside*, 325 N.C. at 402-04, 383 S.E.2d at 918-19. In *Gibson*, the court affirmed its decision in *Whiteside* and concluded that the principles set forth in *Rorie* were applicable to the case before it even though it was the defendant, rather than the state, seeking a lesser included charge under the short-form murder indictment. *Gibson*, 333 N.C. at 38-39, 424 S.E.2d at 100-01. According to the court, it was simply fundamental to due

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process that a defendant not be convicted of a crime with which he had not been charged. *Id.*

We read *Rorie*, *Whiteside* and *Gibson* as standing for the proposition that a statute which simply authorizes a verdict to a lesser offense upon the trial of a defendant on a greater offense does not eliminate the requirement that every essential element of the lesser charge be alleged in the indictment before a defendant may be convicted of the lesser charge. Therefore, we hold that the legislature's proclamation in N.C.G.S. § 14-43.34 that felonious restraint is a lesser included offense of kidnaping does not relieve the State of its duty to allege in the kidnaping indictment that the defendant transported the victim by motor vehicle or other conveyance. Because the state did not allege the element of transportation here, there is nothing on the face of the indictment that can be said to appraise the defendant or the court of the fact that the state was alleging felonious restraint, as opposed to false imprisonment, as a lesser included offense to the kidnaping charge. Accordingly, we hold that the kidnaping indictment in this case is insufficient to support a charge of felonious restraint, and that the trial court, therefore, erred in submitting that charge to the jury as a possible verdict.

[4] Additionally, we hold that because of double jeopardy principles, the State, having chosen to word the kidnaping indictment in a manner which did not support a conviction for felonious restraint, cannot now seek to indict and try defendant on the lesser included offense of felonious restraint.¹⁸ However, since the jury's verdict of felonious restraint means that they found each of the elements of false imprisonment, we remand this case to the trial court for imposition of judgment and appropriate sentencing for the offense of false imprisonment.

VACATED AND REMANDED for imposition of judgment and sentence on false imprisonment.

Judges GREENE and MARTIN, Mark D., concur.

18. See *Gibson*, 333 N.C. at 39, 424 S.E.2d at 101 (holding that the state takes a risk in using a short-form indictment since a verdict of not guilty of the crime on which defendant is indicted prohibits the state on double jeopardy principles from retrying the defendant on the lesser included crimes).

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[128 N.C. App. 697 (1998)]

STATE OF NORTH CAROLINA, PLAINTIFF V. MARION LAMONT FLOWERS,
DEFENDANT

No. COA96-1532

(Filed 3 March 1998)

1. Evidence and Witnesses § 1331 (NCI4th)— juvenile confession—warnings before confession—evidence sufficient

The trial court did not err in the prosecution of a juvenile as an adult for armed robbery and assault by denying defendant's motion to suppress his confession where the court's finding that a warning which fully satisfied *Miranda* and N.C.G.S. § 7A-595(a) was read to defendant before he was questioned is supported by competent evidence and is therefore conclusive.

2. Evidence and Witnesses § 1276 (NCI4th)— juvenile confession—explanation of rights—sufficient

The trial court did not err in the prosecution of a juvenile as an adult for armed robbery and assault by denying defendant's motion to suppress his confession where defendant contended that the significance of his rights was not explained to him. An interrogating officer need not explain *Miranda* rights in greater detail than required by *Miranda* even when the suspect is a minor, nor must the officer explain juvenile rights in greater detail than required by N.C.G.S. § 7A-595(a).

3. Evidence and Witnesses § 1263 (NCI4th)— juvenile confession—*Miranda* and statutory rights—express waiver not required

The trial court did not err in the prosecution of a juvenile as an adult for armed robbery and assault by denying defendant's motion to suppress his confession where defendant argues that he never expressly waived his rights. The rule in North Carolina that a person could waive his *Miranda* rights only by an express statement has long since been repudiated and no statute requires an express waiver of juvenile rights.

4. Evidence and Witnesses § 1276 (NCI4th)— juvenile defendant—waiver of rights—capacity to understand

The trial court correctly concluded that a juvenile defendant being tried as an adult for armed robbery and assault understood his *Miranda* rights and knowingly, intelligently, and voluntarily waived those rights before making a statement. There was no evi-

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dence of coercion and, although defendant argues that he lacked the capacity to understand his rights because of his youth and low mental ability, he invoked his right to remain silent when asked about an unrelated matter, indicating that he had the capacity to understand and exercise his rights. Moreover, he denied his participation in this robbery until his mother told him to tell the truth, suggesting that he was aware that speaking to the police could have negative consequences.

Appeal by defendant from judgment entered 31 May 1996 by Judge D. Jack Hooks, Jr. in Columbus County Superior Court. Heard in the Court of Appeals 18 September 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth R. Bare, for the State.

William L. Davis, III, for defendant-appellant.

LEWIS, Judge.

Pursuant to a plea agreement, defendant pled guilty to robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury. We affirm his convictions.

At approximately 2:00 a.m. on 12 April 1995, the BP Hasty Mart in Chadbourn, North Carolina was robbed by two black males. In the course of the theft a customer, Larry Harrison, was shot in the neck by one of the robbers. He survived.

Investigators developed a list of suspects that included defendant, who was one month shy of his fourteenth birthday. On the evening of 13 April 1995, defendant's mother, Teresa Kelly, learned that the police were looking for her son. On her own volition she brought defendant to the Chadbourn Police Department. Defendant and his mother were escorted to a private room by Special Agent Warner and Detective Coffman. Coffman told defendant's mother that her son was in a lot of trouble and that the police needed to speak with him.

Before asking defendant any questions, Special Agent Warner read defendant his rights in the presence of defendant's mother. After each right was read, Warner asked defendant and his mother if they understood. They answered "Yes" each time. Defendant made no affirmative statement regarding whether he agreed to talk to the investigators or whether he wanted an attorney present. The investi-

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gators proceeded to interrogate defendant in his mother's presence for 1½ to 2 hours.

When first asked about the Hasty Mart robbery, defendant denied any involvement and indicated that he was at home at the time the robbery occurred. Defendant's mother intervened and told him to tell the truth. Defendant then changed his story and gave a statement implicating himself in the Hasty Mart robbery. When he was asked by Detective Coffman about a different, unrelated crime, defendant indicated that he did not want to talk about it. The officers ended the interrogation and charged defendant for his part in the Hasty Mart robbery.

The State filed petitions alleging that defendant was a delinquent juvenile, that he had committed robbery with a dangerous weapon in violation of N.C.G.S. § 14-87 (1993), and that he had attempted to murder Larry Harrison in violation of N.C.G.S. § 14-17 (1993). After a hearing the court found probable cause as to robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury in violation of N.C.G.S. § 14-32(a) (1993). The court found no probable cause for attempted murder. The State moved to transfer the case to superior court for trial of defendant as an adult pursuant to N.C.G.S. §§ 7A-608 and 7A-610 (1995). The motion was granted and the court made specific findings as to why a transfer was appropriate.

A grand jury indicted defendant for armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant moved to dismiss the case from superior court for lack of jurisdiction and moved to suppress the statement defendant had given investigators the day after the robbery. The trial court conducted a hearing on the defense motions and heard testimony from Special Agent Warner, defendant's mother, defendant, and a clinical psychologist who had examined defendant. Both defense motions were denied. On 28 May 1996, defendant pled guilty to armed robbery and assault with a deadly weapon in exchange for the State's dismissal of the conspiracy charge, reserving the right to appeal the court's denial of his suppression motion. He was sentenced on 31 May 1996 and now appeals his convictions.

Defendant has abandoned assignments of error four and six by failing to argue them in his brief. N.C.R. App. P. 28.

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[1] Defendant first assigns error to the trial court's denial of his motion to suppress his confession of 13 April 1995. He argues that the court erred in concluding he was not in custody when he made the confession. For purposes of this appeal, we will assume without deciding that defendant was in custody at the time his confession was obtained.

Defendant argues that despite being in custody, he was not informed of his constitutional and statutory rights until after he was questioned and therefore his confession was illegally obtained. The trial court found as a fact that Special Agent Warner read the following rights to defendant and his mother before any questioning began:

You have the right to remain silent. Do you understand this right? Anything you say can be and may be used against you. Do you understand this right? You have the right to have a parent, guardian, or custodian present during questioning. Do you understand? You have the right to talk with a lawyer for advice before questioning and to have that lawyer with you during any questioning. If you cannot afford to hire a lawyer, one will be appointed to represent you at no cost before any questioning, if you wish.

This warning fully satisfied the requirements of N.C. Gen. Stat. § 7A-595(a) (1995) and *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). The court's finding that this warning was read to defendant before he was questioned is supported by competent evidence and is therefore conclusive on appeal. *State v. Gibson*, 342 N.C. 142, 146-47, 463 S.E.2d 193, 196 (1995).

[2] Defendant argues that even if he was read his rights before he was questioned, the significance of those rights was not explained to him. An interrogating officer need not explain the *Miranda* rights in any greater detail than what is required by *Miranda*, even when the suspect is a minor. See, e.g., *California v. Prysock*, 453 U.S. 355, 356-57, 361, 69 L. Ed. 2d 696, 699-700, 702 (1981); *Fare v. Michael C.*, 442 U.S. 707, 726, 61 L. Ed. 2d 197, 213 (1979); *State v. Brown*, 112 N.C. App. 390, 395-97, 436 S.E.2d 163, 166-68 (1993), aff'd per curiam, 339 N.C. 606, 453 S.E.2d 165 (1995). Nor is there a statutory duty to explain the juvenile rights in greater detail than what is required by G.S. 7A-595(a). The warning defendant received was sufficient.

[3] Defendant contends that even if he was sufficiently informed of his juvenile rights, he did not waive those rights before confessing. In

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support of this contention, defendant first asserts that he never expressly waived his rights to remain silent or to the assistance of counsel. It was once the rule in North Carolina that a person could waive his *Miranda* rights only by an express statement of waiver, but that rule has long since been repudiated. *North Carolina v. Butler*, 441 U.S. 369, 373, 60 L. Ed. 2d 286, 292 (1979). Moreover, we find no statute that requires a waiver of juvenile rights to be expressly made in order to be valid. Defendant was entirely capable of waiving his constitutional and statutory rights without executing a written waiver. See *In re Horne*, 50 N.C. App. 97, 101-02, 272 S.E.2d 905, 908-09 (1980).

[4] Defendant next argues that he did not waive his rights knowingly, willingly, or intelligently because he did not understand them or the consequences of waiving them. More specifically, defendant argues that he lacked the capacity to understand his rights because of his youth and low mental ability.

A statement made during custodial interrogation is admissible only if the juvenile knowingly, willingly, and understandingly waived his rights. N.C. Gen. Stat. § 7A-595(d); *State v. Thibodeaux*, 341 N.C. 53, 58, 459 S.E.2d 501, 505 (1995). A defendant's youth or subnormal mental capacity does not necessarily render him incapable of waiving his rights knowingly and voluntarily. *State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983). The State must show by a preponderance of the evidence that the defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary. *Thibodeaux*, 341 N.C. at 58, 459 S.E.2d at 505.

At the suppression hearing, Dr. Richard Rumer, a clinical psychologist, testified as to defendant's mental capacity based upon his testing and interview of defendant. Dr. Rumer stated that one test revealed that defendant had problems paying attention. Dr. Rumer stated that he also tested defendant using the Wechsler Intelligence Scale test (the "WIS III"), which, according to Dr. Rumer, is the standard intelligence test in use today. On the WIS III, defendant functioned in the mildly retarded range, with a full scale I.Q. of 56 and a verbal I.Q. of 48. Based on these tests and others, Dr. Rumer believed that defendant's mental deficiencies substantially impaired his ability to understand his *Miranda* rights. On cross-examination Dr. Rumer admitted that it was possible for psychologists to arrive at different results using essentially the same standardized tests. Dr. Rumer also

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admitted that it is possible for someone taking these tests to not try his best, either intentionally or for lack of interest.

The trial court made extensive findings of fact after hearing the testimony of Dr. Rumer, Special Agent Warner, defendant's mother, and defendant himself. The findings are summarized except where quoted in the three paragraphs that follow.

Defendant and his mother were fully advised of defendant's juvenile and *Miranda* rights. After each right was read, Special Agent Warner asked defendant and his mother if they understood, and both replied yes. Defendant's mother was present at all times during questioning. When first questioned, defendant denied that he participated in the Hasty Mart robbery. Defendant's mother intervened and told defendant to tell the truth. Defendant then changed his story and gave the officers a detailed account of his involvement in the Hasty Mart robbery. Special Agent Warner transcribed defendant's answers and defendant and his mother signed the transcript once the interrogation had ended.

Defendant's education at the time was at the seventh grade level, although there was evidence that defendant did not actually perform at that level. Defendant "may be of less than average intelligence at least as tested by I.Q. tests and other personality profile tests and intelligence tests." When he was interrogated, however, defendant's answers were coherent, responsive, and reasonable in relation to the questions asked. There was no evidence that defendant was under the influence of alcohol or drugs or that he was physically injured at the time of interrogation. There was no evidence that any promises, threats, or shows of force were directed at defendant to induce his making a statement or waiving his rights. Defendant was allowed to use the bathroom.

At one point during the questioning, defendant was asked about an unrelated event but refused to talk about it. His refusal was honored by the investigators. Defendant never indicated that he did not want to discuss the Hasty Mart robbery or that he wanted an attorney.

On these findings, the court concluded that defendant in fact understood his *Miranda* rights and that he knowingly, intelligently, and voluntarily waived those rights before making his statement. We hold that the trial court's conclusions of law were supported by its findings and that its findings were supported by the evidence.

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There is no evidence of coercion. On the issue of whether defendant waived his rights knowingly, we find it most significant that defendant *invoked* his right to remain silent when he was asked about a matter unrelated to the Hasty Mart robbery. This indicates defendant had both the capacity to understand his rights and the capacity to exercise them freely. *See Fincher*, 309 N.C. at 20, 305 S.E.2d at 697 (juvenile defendant who claimed he was of subnormal mental capacity refused to make a second statement until he confronted a co-defendant; defendant thereby demonstrated an awareness "of his right to control the timing and subject matter of police questioning"). In addition, defendant at first denied that he participated in the Hasty Mart robbery but changed his story after his mother told him to tell the truth. His initial denial of involvement suggests he was well aware that speaking to the police could have negative consequences. The trial court's conclusion that defendant knowingly, intelligently, and voluntarily waived his rights was supported by the findings of fact. We find no error in the court's denial of defendant's motion to suppress.

Defendant's remaining assignments of error pertain to issues not appealable of right. Because defendant entered a guilty plea, his right to appeal is limited to those issues found in N.C.G.S. §§ 15A-979 (1988) (motions to suppress evidence) and 15A-1444 (Cum. Supp. 1996) (sentencing). G.S. 15A-1444(e). After examining the record we decline to review his remaining assignments by certiorari.

Affirmed.

Judges MARTIN, John C. and McGEE concur.

FANTASY WORLD, INC., PETITIONER-APPELLANT V. GREENSBORO BOARD OF
ADJUSTMENT, AND CITY OF GREENSBORO, RESPONDENTS-APPELLEES

No. COA97-210

(Filed 3 March 1998)

1. Zoning § 89 (NCI4th)—adult business regulation—“preponderance” of material—not unconstitutionally vague

A Greensboro ordinance restricting adult entertainment businesses was not unconstitutionally vague where the ordinance referred to mini motion picture booths showing a “preponder-

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ance" of motion pictures characterized by sexual activities. The word "preponderance" is reasonably specific and sufficiently precise as to be readily understood. Moreover, the ordinance was not unconstitutionally applied because the evidence clearly showed that petitioner was aware of the zoning restriction and was specifically informed that "no adult use" could be made of the former restaurant.

2. Zoning § 52 (NCI4th)— nonconforming use—adult mini motion picture theater—extension of use

There was substantial evidence to support the Greensboro Board of Adjustment's finding that a former restaurant was being used as an adult mini motion picture theater, that it contained viewing booths, and that a preponderance of those motion pictures were adult as defined by the ordinance. That finding supports the Board's decision that petitioner's use of the premises was an impermissible enlargement or extension of a nonconforming use.

Appeal by petitioner from order entered 18 July 1996 by Judge Ben F. Tenille in Guilford County Superior Court. Heard in the Court of Appeals 9 October 1997.

Loflin & Loflin, by Thomas F. Loflin, III; Sirkin, Pinales, Mezibov & Schwartz, by H. Louis Sirkin and Laura A. Abrams, for petitioner-appellant.

Linda A. Miles and Becky Jo Peterson-Buie, for respondent-appellees.

MARTIN, John C., Judge.

Petitioner, Fantasy World, Inc., appeals from an order of the superior court affirming a decision of the Greensboro Board of Adjustment which upheld a Notice of Violation issued by the Zoning Enforcement Division of the City of Greensboro Planning Department. A summary of the factual and procedural history of the case follows:

Effective 18 March 1993, the City of Greensboro amended its Development Ordinance regulating adult entertainment businesses to prohibit the location of any "adult bookstore, adult mini motion picture theater, adult motion picture theater, adult live entertainment business or adult massage parlor" within a specified distance of any

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other such adult establishment. Greensboro Code of Ordinances § 30-5-2.21(B)(1). Immediately prior to the effective date of the amendment, a permit was issued for property located at 4018 West Wendover Avenue in Greensboro permitting the operation of a live adult entertainment business, specifically a "topless" bar, in one portion of the building, and a restaurant in the other portion. The foregoing amendment to the Development Ordinance would have prohibited use of the property as an adult entertainment establishment. However, the Development Ordinance also provided:

§ 30-4-11.2 Nonconforming use of land.

(A) *Continuance of Nonconforming Use of Land:* Any nonconforming use legally existing at the time of . . . amendment of this Ordinance, . . . may be continued subject to conditions provided in Section 30-4-11.2(B) below.

(B) *Conditions for Continuance:* Such nonconforming use of land shall be subject to the following conditions:

. . .

(2) No such nonconforming use shall be enlarged, increased, or extended to occupy a greater area of land or floor area than was occupied at the effective date of adoption or amendment of this Ordinance.

Greensboro Code of Ordinances § 30-4-11.2. Therefore, because the permit had been issued prior to the effective date of the amendment to the Development Ordinance, the adult entertainment business was permitted to continue as a nonconforming use.

On 15 June 1994, a license was issued to petitioner to operate a business at the location. Petitioner continued to use the adult entertainment portion of the building for live adult entertainment, but stopped using the other portion as a restaurant and subsequently sought to use the former restaurant space for lingerie sales. Accordingly, on 1 September 1994, staff members of the Greensboro Planning Department attached a note to the building plans specifying that no adult entertainment would be permitted in the former restaurant portion of the building.

On 29 November 1994 and 14 December 1994, Greensboro Zoning Enforcement Officers Levine and Parham visited the property and determined that the former restaurant space was being operated as an adult bookstore and mini motion picture theater. Consequently, on

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27 December 1994, the City of Greensboro Zoning Enforcement Division issued a Notice of Violation instructing petitioner to cease all adult sales and use of the adult mini motion picture theater because petitioner's use of the property violated the restrictions of the zoning ordinance for the location of adult businesses or, alternatively, its use of the property was an impermissible expansion of a nonconforming use.

Petitioner appealed the Notice of Violation to the Greensboro Board of Adjustment. After a hearing, the Board of Adjustment concluded that petitioner's use of the former restaurant space as an adult book store and as an adult mini motion picture theater was an impermissible expansion of a non-conforming use. On *certiorari*, the superior court found substantial evidence in the record to support the Board's finding that petitioner was operating an adult mini motion picture theater in the former restaurant space, but found insufficient evidence to sustain the Board's finding that petitioner was operating an adult bookstore in such space. The superior court concluded that the Board's decision upholding the Notice of Violation was based upon its finding that petitioner had extended the nonconforming use of the property by operating the adult mini motion picture theater. The superior court determined that petitioner's due process rights had been protected, that the Board had followed lawful procedures, that its decision was based upon substantial evidence, was not the result of an error of law, and was not arbitrary or capricious.

A decision of a board of adjustment is subject to judicial review by the superior court by a proceeding in the nature of *certiorari*. N.C. Gen. Stat. § 160A-388(e) (1994). The superior court sits as an appellate court, and its scope of review includes:

- (1) Reviewing the record for errors in law,
- (2) Insuring that procedures specified by law in both statute and ordinance are followed,
- (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
- (4) Insuring that decisions of . . . boards are supported by competent, material and substantial evidence in the whole record, and

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(5) Insuring that decisions are not arbitrary and capricious.

Simpson v. City of Charlotte, 115 N.C. App. 51, 54, 443 S.E.2d 772, 775 (1994), citing *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 265 S.E.2d 379, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). Both the superior court and this Court, upon review of the superior court's decision, are bound to apply all of the above standards. *Concrete Co.*, *supra*. By its assignments of error, petitioner contends: (1) the Board's decision amounted to an error of law and was arbitrary and capricious because the provisions of the Greensboro City Development Code upon which the Greensboro Zoning Enforcement Division relied in issuing the Notice of Violation are unconstitutional, both facially and as applied to petitioner in this case; and (2) the Board's decision was not based upon substantial evidence in the record to support its finding that petitioner had extended a non-conforming use by operating an "adult mini motion picture theater" in that portion of the business previously used as a restaurant.

I.

[1] Petitioner's initial argument is that the Board's decision is contrary to law and is arbitrary and capricious because the Greensboro ordinance restricting adult entertainment businesses is unconstitutionally vague. Greensboro clearly has the power to regulate the location of adult oriented businesses, *see Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929, 65 L.Ed.2d 1124 (1980), and petitioner makes no argument to the contrary. Nor does petitioner contend, in its argument to this Court, that the manner of regulation violates either its rights under the First Amendment or its rights to equal protection. The ordinance defines "adult mini motion picture theater" as follows:

Theater, adult mini motion picture. An enclosed building with viewing booths designed to hold patrons which is used for presenting motion pictures, a *preponderance* of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined by this Section, for observation by patrons therein (emphasis added).

Greensboro Code of Ordinances § 30-2-2.7. Petitioner's sole constitutional argument on this appeal is that because the zoning ordinance seeks to regulate expression protected by the First Amendment, its prohibitions must be clearly and specifically defined. The ordinance

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does not, in defining “adult mini motion picture theater,” set forth the specific meaning of “preponderance”; therefore, petitioner contends the ordinance is void for vagueness.

Statutes and ordinances must be sufficiently precise; a “statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *Connally v. General Const. Co.*, 269 U.S. 385, 391, 70 L.Ed. 322, 328 (1926). Ultimately, notice is the most important criteria; a statute or ordinance will be found to violate due process if it fails to give adequate notice to parties which might be affected by its application. *Smith v. Goguen*, 415 U.S. 566, 39 L.Ed.2d 605 (1974). It is impossible to comply with a law if poor drafting has obscured its true meaning. A constitutional challenge to a statute can either be facial or as the statute is applied in the particular situation. *Id.* In this case, neither type of challenge succeeds.

Although there have been no reported cases in which North Carolina’s appellate courts have considered whether language similar to that contained in the Greensboro ordinance can survive a facial constitutional challenge for vagueness, the United States Court of Appeals for the Fourth Circuit has addressed the issue. *Hart Book Stores, Inc. v. Edmisten, supra*. In *Hart Book Stores*, the Court examined language contained in G.S. § 14-202.10 (1985) (formerly N.C. Gen. Stat. § 14-202.11) which defines “adult mini motion picture theater” identically to the Greensboro ordinance. The Court determined the component elements of the definition contained in the statute were sufficient to withstand a challenge for vagueness, specifically observing that the statute’s reference to the term “preponderance” was “reasonably specific and precise, bearing in mind that unavoidable precision is not fatal and celestial precision is not necessary” *Id.* at 833. We choose to follow *Hart* and hold the use of the word “preponderance” in the Greensboro ordinance is reasonably specific and sufficiently precise as to be readily understood and, therefore, the ordinance is not unconstitutionally vague on its face.

Nor do we conclude that the ordinance has been unconstitutionally applied to petitioner. Evidence before the Board of Adjustment clearly shows that petitioner was aware of the zoning restriction on adult businesses and was specifically informed that “no adult use” could be made of the former restaurant portion of the building. Thus, contrary to petitioner’s argument, there was no question of how much

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adult content would be too much, petitioner was neither misled nor uniquely affected by a failure of the ordinance to more specifically define “preponderance.”

II.

[2] In its second argument, petitioner contends there was insufficient evidence to support the Board’s finding that petitioner was operating an adult mini movie theater, as defined by the ordinance, in the former restaurant space and, therefore, its decision that petitioner had extended a nonconforming use was not supported by substantial evidence. Petitioner argues that regardless of how “preponderance” is defined, there was insufficient evidence before the Board to establish that petitioner’s use of the former restaurant space met the definition of “adult mini motion picture theater.” We disagree.

Mr. Levine, a zoning enforcement officer for the City of Greensboro, testified that when he went to the former restaurant premises, he observed, in addition to an area where approximately one hundred items of lingerie were offered for sale, approximately 1,400 adult-oriented video taped films were offered for sale. A video viewing screen displaying continuous adult oriented films was located above the service counter; the viewing screen was visible from the front of the store as well as from the area where the films were offered for sale. There were display cases showing tape boxes for thirty-two adult oriented video motion pictures and a fewer number of G-rated videos available for viewing in twenty viewing booths. Depicted on the boxes for the adult tapes were scenes from the films contained therein and consisted of photos of unclothed performers engaged in various sexual acts. While the display case for the adult oriented films was well lighted, the display case for the G-rated films was located in a dimly lit area, requiring the inspector to use a flashlight to read the titles. Each viewing booth offered sixteen adult films and two G-rated films. Within the viewing booths, the adult films were shown on a seventeen inch color television screen; the G-rated selections were shown on a smaller black and white screen. In addition, there were six preview booths in which customers were able to view entire adult-oriented videos selected from the 1,400 films offered for sale. Advertising materials for the store described it as “Xanadu Video and Boutique” and stated that the video viewing booths were open twenty-four hours a day.

We hold the foregoing evidence was substantial evidence to support the Board’s finding that the former restaurant portion of the

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building was being used as an "adult mini motion picture theater", i.e., that it contained viewing booths used for presenting motion pictures for observation by patrons therein, and that a preponderance, or "superiority in weight" [Webster's 3d New International Dictionary (1976)] of those motion pictures were adult materials as defined by the ordinance. Such finding, in turn, supports the Board's decision that petitioner's use of the premises as an adult mini motion picture theater was an impermissible enlargement or extension of the non-conforming use of the premises at 4018 West Wendover Avenue as an adult entertainment establishment.

III.

Although neither raised nor argued by petitioner, we have also examined the record of proceedings before the Board of Adjustment and conclude that the Board, in conducting its hearing, followed the procedures required by applicable statutes, the Greensboro Code of Ordinances, and its own rules and afforded petitioner appropriate due process rights, including the right to offer evidence, cross-examine witnesses, and inspect documents. We affirm the order of the superior court.

Affirmed.

Judges LEWIS and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. SAMUEL FERESEE, DEFENDANT

No. COA97-154

(Filed 3 March 1998)

1. Criminal Law § 381 (NCI4th Rev.)—request for extension of time—unrepresented defendant—nod by judge—unspoken deadline

There was a prejudicial abuse of discretion requiring remand in a stalking prosecution where defendant was not represented by counsel at the time of his arraignment on 24 June; defendant requested an extension of time in which to file motions for a bill of particulars and for a change of venue; the trial judge nodded; defendant obtained counsel on 9 August and filed the motions

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three days later; and, when counsel asked the court to rule on the motions on 27 August, the trial judge noted that he had intended by his nod to grant the normal 10 or 20 days. Nothing appears in the record to indicate that defendant knew or should have known of the judge's unspoken deadline; while an attorney may have been expected to recognize the need for a specific deadline, defendant was not yet represented and it was not his intention to represent himself. Failure to give a definite date coupled with the later refusal to hear the motions was prejudicial because it appears that proper consideration would have led to a change of venue.

2. Evidence and Witnesses § 213 (NCI4th)— stalking—events before warning—relevant

In a stalking prosecution remanded on other grounds, the trial court did not abuse its discretion by admitting evidence relating to events which occurred before defendant was warned to stay away from the victim. Although the 1993 statute applicable here only criminalizes acts that occur after the warning, the evidence was relevant to enlighten the jury to the background between the defendant and the victim and to allow them to place into context the reason defendant was warned to stay away.

3. Criminal Law § 828 (NCI4th Rev.)— instruction on corroboration—denied erroneously

In a stalking prosecution remanded on other grounds, the trial court erred by not giving a requested instruction on corroboration where two witnesses testified about prior statements made by the victim concerning defendant's conduct.

Judge MARTIN (Mark D.) concurring in the result only

Appeal by defendant from judgment entered 29 August 1996 by Judge George L. Wainwright, Jr., in Craven County Superior Court. Heard in the Court of Appeals 28 October 1997.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robin P. Pendergraft, for the State.

Steven P. Rader for defendant-appellant.

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WYNN, Judge.

[1] Defendant Sam Ferebee appeals his conviction for stalking. Based on an error committed by the trial judge before the defendant's trial occurred, the defendant must be given a new trial.

Ferebee was arraigned on 24 June 1996 and his trial was calendared for 27 August 1996. At his arraignment on 24 June 1996, Ferebee—who was not represented by counsel at the time—requested and was granted an extension of time in which to file motions for a bill of particulars and for change of venue. The trial court, however, did not specify a deadline or other time frame for the filing of the motions. The record reflects that Ferebee obtained counsel on 9 August 1996 and three days later, that counsel filed the motions for a bill of particulars and for a change of venue.

On 27 August 1996, Ferebee's counsel asked the court to rule on the motions. The trial court noted that at the arraignment on 24 June

the Court declined to continue the arraignment and the defendant advised Judge Wainwright that he would need additional time after he obtained counsel to file pretrial motions. Judge Wainwright nodded his head and the defendant believed that the Court had granted that request.

In response the trial court said:

I think that's a true statement. I think that's absolutely true.

But let me tell you by my nodding of my head what I intended. I would have given Mr. Ferebee ample time to file anything, such as the normal 10 or 20 days, which is allowable, which I would always allow.

N.C. Gen. Stat. § 15A-952 provides that if arraignment is held prior to the session of court for which the trial is calendared motions for a bill of particulars and for change of venue must be made at or before the time of arraignment. N.C. Gen. Stat. § 15A-952(b) & (c) (Cum. Supp. 1996). Failure to file such motions within the prescribed time constitutes waiver of the motions. N.C. Gen. Stat. § 15A-952(e) (Cum. Supp. 1996). The trial court may grant a defendant additional time in which to file a motion. N.C. Gen. Stat. § 15A-952(b) (Cum. Supp. 1996).

Here, it is apparent that defendant was granted additional time at the arraignment, but did not file the motions until August 12th, forty-

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nine days later. The later-expressed intention of the trial court was apparently that Ferebee would have from ten to twenty days after the arraignment in which to file the motions. The trial court, however, did not tell Ferebee that that was what he meant. Nothing appears in the record to indicate that Ferebee knew or should have known of the judge's unspoken deadline. And, in fact, nothing could appear in the record to indicate that knowledge because there was simply no way for Ferebee to have known the judge's unexpressed thought.

An attorney may have been expected to recognize the need to have a specific deadline for the extension. In fact, once Ferebee retained counsel on 9 August 1996, both motions were filed within three days. However, in this case Ferebee was not yet represented by a lawyer when he requested and received the extension. Furthermore, it was not Ferebee's intention to represent himself. The trial judge knew, as Ferebee had told him, that Ferebee planned to obtain counsel to represent him. A litigant who has not yet obtained an attorney could not be expected to recognize the need to clarify the judge's grant of the extension. In such a situation, the trial court should have given him a definite date by which to file the motions.

Furthermore, on the facts of this case, the failure to give a definite date coupled with the later refusal to hear the motions constituted an abuse of discretion. Items in the record on appeal suggest that a fair trial required consideration of the motions, especially the motion for a change in venue. In particular, we note that included with the record were two letters from different churches in the community telling Ferebee not to return to worship there. Because it appears that proper consideration of the motions would have led to a change in venue, it was in the interest of justice for the trial court to consider the motions. We therefore hold that the failure to do so constituted an abuse of discretion which prejudiced the defendant.

Accordingly, we vacate Ferebee's conviction and remand for consideration of the motions and a new trial.

II.

[2] Several other issues raised on appeal appear likely to reoccur during the new trial, so we consider them as well. Also, we note that the statute that Ferebee was charged with violating has subsequently been changed by the legislature. The version relevant for this appeal and for the new trial is as follows:

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- (a) Offense.—A person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of another person without legal purpose:
- (1) With the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury;
 - (2) After reasonable warning or request to desist by or on behalf of the other person; and
 - (3) The acts constitute a pattern of conduct over a period of time evidencing a continuity of purpose.

N.C. Gen. Stat. § 14-277.3(a) (1993), *current version at* N.C. Gen. Stat. § 14-277.3(a) (Cum. Supp. 1997).

A.

Ferebee argues that evidence offered by the State which related to events occurring before he was warned to stay away from the victim should not have been admitted because it was irrelevant and highly prejudicial to him. We disagree.

Although the statute only criminalizes acts that occur after the warning, as the State points out in its brief some objectionable acts would have to occur before the victim would have a reason to warn the person to stop, and admission of such evidence is relevant to show the context in which the warning was made. Accordingly, we disagree with Ferebee's contention that the evidence was irrelevant.

As to the prejudice of the evidence, under N.C. Gen. Stat. § 8C-1, Rule 403 (1992), "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The decision to exclude evidence under Rule 403 is left to the discretion of the trial court, and will only be reversed on appeal upon a showing that the decision was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision. *State v. Womble*, 343 N.C. 667, 690, 473 S.E.2d 291, 304 (1996), *cert. denied*, 117 S. Ct. 775, 136 L. Ed. 2d 719 (1997). In this case, we do not discern an arbitrary or unreasoned decision, as the evidence was relevant to enlighten the jury to the background between the defendant and the victim and to allow them to place into context the reason Ferebee was warned to stay away. We hold that the trial judge did not abuse its discretion by admitting the evidence.

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B.

[3] Two witnesses, a police officer and a minister, testified about prior statements made by the victim concerning Ferebee's conduct. Ferebee asked for and was denied an instruction on corroboration, and now argues that the trial court erred by denying his request. Evidence of prior consistent statements is admissible for the limited purpose of affirming a witness's credibility, and upon proper request a defendant is entitled to both a limiting instruction at the time of its admission and a jury instruction as to its limited purpose. *State v. Grant*, 57 N.C. App. 589, 592, 291 S.E.2d 913, 915-16, *disc. review denied*, 306 N.C. 560, 294 S.E.2d 225 (1982). Accordingly, it was error for the trial court to not give the instruction. At the retrial, if the prosecution again introduces this evidence, the trial judge should give the corroboration instruction.

We note that Ferebee also argues that the court erred by not declaring a mistrial based on comments made by a prospective juror, that the court erred by admitting details concerning Ferebee's arrest, and that the jury instructions were defective. We find no merit to these contentions and do not consider them further. We also do not address his argument that the trial court erred by not granting his motions to dismiss. For the reasons given above,

New Trial.

Judge EAGLES concurs.

Judge MARTIN, Mark D. concurs in the result only in separate opinion.

Judge MARTIN, Mark D., concurring in the result only.

I concur in the majority's conclusion that the trial court's failure at arraignment to expressly give the defendant a specific deadline for filing his motions is reversible error. I do not join in the majority's statement, however, that "proper consideration of the motions would have led to a change in venue" as I believe this question is properly left for resolution by the trial court on remand.

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[128 N.C. App. 716 (1998)]

CASWELL REALTY ASSOCIATES I, L.P., PLAINTIFF v. ANDREWS COMPANY, INC.,
F/K/A HILLS FOOD STORES, INC. AND NASH-FINCH COMPANY, INC., DEFENDANTS

No. COA96-1514

(Filed 3 March 1998)

1. Judgments § 272 (NCI4th)— lease termination—prior voluntary dismissal with prejudice—final adjudication—res judicata—collateral estoppel

The trial court correctly granted defendant Andrews' motion for summary judgment based upon res judicata and/or collateral estoppel in an action arising from the termination of commercial leases where a voluntary dismissal with prejudice in one of several previous actions was a final adjudication on the merits and there was a sufficient identification of the cause of action with this case.

2. Judgments § 272 (NCI4th)— lease termination—prior summary judgment—final adjudication—res judicata

The trial court did not err by granting summary judgment for defendant Nash-Finch based upon res judicata in an action arising from the termination of commercial leases where a summary judgment in one of several previous actions was a final adjudication on the merits for purposes of res judicata and the causes of action are readily identifiable as being the same.

3. Trial § 13 (NCI4th)— continuance—discretion of trial court

The trial court did not abuse its discretion by denying a motion to continue in an action arising from the termination of commercial leases. Motions to continue pursuant to N.C.G.S. § 1A-1, Rules 56(f) and 40(b) are in the trial court's discretion and the court's ruling will not be disturbed absent an abuse of discretion.

Appeal by plaintiff from order entered 8 August 1996 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 9 September 1997.

Shipman & Associates, L.L.P., by Gary K. Shipman and C. Wes Hodges, II, for plaintiff-appellant.

Marshall, Williams & Gorham, L.L.P., by Lonnie B. Williams, for defendant-appellee Andrews Company, Inc.

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Maupin, Taylor, Ellis & Adams, P.A., by Gilbert C. Laite, III and M. Keith Kapp, for defendant-appellee Nash-Finch Company, Inc.

TIMMONS-GOODSON, Judge.

This action is the last in a series of three lawsuits arising from an alleged breach of two commercial leases. On 7 August 1987, plaintiff Caswell Realty Associates I, L.P. (hereinafter "Caswell Realty") and defendant Andrews Company, Inc. (hereinafter "Andrews"), formerly known as Hills Foods Stores, Inc., entered into a commercial lease, wherein defendant Andrews agreed to lease from plaintiff approximately 21,000 square feet at the Cape Fear Shopping Center in New Hanover County, North Carolina, for the operation of a grocery store. The lease period was to commence on 1 August 1987 and terminate on 31 July 2002.

In April 1988, Caswell Realty entered into a second commercial lease with defendant Andrews, wherein defendant Andrews agreed to lease from Caswell Realty approximately 19,880 square feet at the Live Oak Village Shopping Center in Brunswick County, North Carolina, for the operation of a grocery store. Subsequently, defendant Andrews closed its Brunswick County store and breached its lease with Caswell Realty. As a result, Caswell Realty filed an action for breach of contract, *Caswell Realty Associates I, L.P. v. Hills Food Stores, Inc.*, 91CVS34 (hereinafter "Brunswick County I").

Prior to trial, representatives of Caswell Realty and defendant Andrews entered into settlement negotiations, and consequently, executed a Stipulation of Dismissal with prejudice for *Brunswick County I*. Later, on 12 January 1994, Caswell Realty filed the Stipulation of Dismissal and sent a letter to defendant Andrews' attorney advising of its actions. A \$62,500 check was deposited into the trust account of Caswell Realty's attorney on 14 January 1994, as agreed by the parties. Caswell Realty's managing agent subsequently prepared a Sublease Termination Agreement for the Brunswick County lease and a Lease Termination Agreement for the New Hanover County lease. Both documents indicated that defendant Andrews "has made certain representations to [Caswell Realty] of its financial capabilities and its inability to perform its obligations under the [lease/s]ub-lease and desires to surrender the Rental Space to [Caswell Realty] and terminate the [lease/s]ub-lease and [Caswell Realty] is hereby relying on such representations."

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Caswell Realty subsequently learned that defendants Andrews and Nash-Finch had negotiated an Asset Purchase Agreement, whereby defendant Nash-Finch purchased defendant Andrews and some of Andrews' stores. This offer of purchase had been communicated to defendant Andrews prior to 12 January 1994, despite the representations made by defendant Andrews. Accordingly, Caswell Realty did not execute either of the settlement agreements and filed a Rule 60 motion pursuant to the North Carolina Rules of Civil Procedure in Brunswick County. This motion requested that the court set aside the settlement and Stipulation of Dismissal in *Brunswick County I*, based upon the alleged misrepresentations by defendant Andrews regarding its financial status during settlement negotiations. Specifically, Caswell Realty asserted that it would not have settled its claim against defendant Andrews for \$62,500 if it had known that defendant Nash-Finch would be purchasing the assets of defendant Andrews.

Caswell Realty filed a withdrawal of its Rule 60 motion on the morning that the motion was to be heard. With Caswell Realty's consent, the trial court entered an order allowing the withdrawal of the Rule 60 motion with prejudice. Significantly, after filing the Rule 60 motion, but before entry of the 26 July 1994 order dismissing that motion, Caswell Realty filed the instant action in New Hanover County Superior Court, seeking to recover damages for defendant Andrews' alleged breach of its Cape Fear Center lease. Defendant Nash-Finch was joined as the alleged "alter-ego" of defendant Andrews.

Further, just minutes before filing its withdrawal of the Rule 60 motion in the *Brunswick County I* action on 24 July 1994, Caswell Realty filed a third action in Brunswick County Superior Court, *Caswell Realty Associates I, L.P. v. Andrews Company, Inc. f/k/a Hills Food Stores, Inc. and Nash-Finch Company, Inc.*, 94CVS714 (hereinafter "*Brunswick County II*"). In *Brunswick County II*, Caswell Realty sought to set aside the settlement and Stipulation of Dismissal in *Brunswick County I* on the same grounds as identified in its Rule 60 motion in *Brunswick County I*, which had been withdrawn with prejudice. In the alternative, Caswell Realty sought to recover damages for the alleged misrepresentations in connection with the settlement. Defendant Nash-Finch was also joined in this action as the "alter-ego" of defendant Andrews.

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Defendants moved to dismiss Caswell Realty's *Brunswick County II* action based upon the following principles: (1) Caswell Realty's basis for attacking the Stipulation of Dismissal in *Brunswick County I* was alleged "intrinsic fraud" and such a claim can only be asserted by a Rule 60 motion, not by independent action; (2) Caswell Realty's action was barred by res judicata and collateral estoppel; (3) an independent action for damages due to alleged fraud in the procurement of a judgment (Stipulation of Dismissal) is not permissible until the subject judgment is set aside; and (4) the complaint failed to state a claim for alter-ego liability against defendant Nash-Finch. Defendants' motions came on for hearing, and as matters outside of the pleadings were considered, the motions to dismiss were converted to motions for summary judgment. Summary judgment was thereafter granted for both defendants in *Brunswick County II* by order entered 14 December 1994. On appeal to this Court, we affirmed the trial court's order of summary judgment. *Caswell Realty Associates I v. Andrews Co.*, 121 N.C. App. 483, 466 S.E.2d 310 (1996). Caswell Realty's subsequent motion for rehearing and petition for discretionary review was denied by the North Carolina Supreme Court. *Caswell Realty Associates I v. Andrews Co.*, 343 N.C. 304, 471 S.E.2d 68 (1996).

The present action had been stayed by order of the New Hanover County Superior Court pending the appeal of *Brunswick County II*. After the appeal in *Brunswick County II* was final, however, defendants filed identical motions for judgment on the pleadings, motions for summary judgment, motions for protective order as to the previously served, but stayed, discovery pending a ruling on the dispositive motions, and motions to amend its motion to dismiss. These motions were accompanied by numerous exhibits detailing the history of the three lawsuits and various affidavits. Defendants' motions were set for hearing on 8 July 1996.

Caswell Realty moved to continue the hearing on defendants' motions on the basis of the outstanding discovery requests served on defendants, the response to which had been stayed. This motion was supported by affidavits of Caswell Realty's counsel of record in *Brunswick County I* and a general partner of Caswell Realty.

On 8 July 1996, both of the parties' motions were heard by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Caswell Realty's motion to continue was denied, and defendants' motions to amend and for summary judgment were granted. In the alternative,

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the court granted defendant Nash-Finch's Rule 12(b)(6) motion. The motions for protective order were thereby mooted. Caswell Realty appeals.

[1] Caswell Realty presents three arguments on appeal, but for purposes of judicial economy, we move immediately to Caswell Realty's second argument. For the reasons discussed herein, we hold that the trial court was correct in granting defendants' motions for summary judgment, and in the alternative, defendant Nash-Finch's Rule 12(b)(6) motion.

Summary judgment is properly granted where the party asserting a claim shows that there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c). Summary judgment is appropriate for the defending party when (1) an essential element of the other party's claim or defense is non-existent; (2) the other party cannot produce evidence to support an essential element of its claim or defense; or (3) the other party cannot overcome an affirmative defense which would bar the claim. *Gibson v. Mutual Life Ins. Co. of N.Y.*, 121 N.C. App. 284, 465 S.E.2d 56 (1996).

In order to successfully assert the doctrine of res judicata, a defendant must prove the following essential elements: (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits. *Kabatnik v. Westminster Co.*, 63 N.C. App. 708, 306 S.E.2d 513 (1983). Collateral estoppel, on the other hand, applies "where the second action between the same parties is upon a different claim or demand, [and] the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 353, 24 L. Ed. 195, 198 (1876)), quoted in *In re Wilkerson*, 57 N.C. App. 63, 291 S.E.2d 182 (1982). A dismissal with prejudice is an adjudication on the merits and has res judicata implications. See *Kabatnik*, 63 N.C. App. at 712, 306 S.E.2d at 515; *Barnes v. McGee*, 21 N.C. App. 287, 290, 204 S.E.2d 203, 205 (1974). Further, in *Kabatnik*, this Court also stated, "Strict identity of issues . . . is not absolutely required and the doctrine of res judicata has been accordingly expanded to apply to those issues which could have been raised in the prior action[.]" *Id.* at 712, 306 S.E.2d at 515 (emphasis omitted). While Caswell Realty contends that there has not been a final deter-

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mination on the merits and an identification of the causes of action, we cannot agree. In accordance with previous caselaw, the voluntary dismissal with prejudice was a final adjudication on the merits in *Brunswick County I*. Further, there has been a sufficient identification of the causes of action in *Brunswick County I* and the instant case so as to call the doctrine of res judicata and/or collateral estoppel into play. Caswell Realty's arguments to the contrary fail.

[2] Not only is res judicata a bar as to defendant Andrews, but also as to defendant Nash-Finch on the alter-ego claim. The order of summary judgment in *Brunswick County II* was a final adjudication on the merits for purposes of the doctrine of res judicata, and the causes of action against defendant Nash-Finch in *Brunswick County II* and the instant action are readily identifiable as being the same. Hence, the trial court did not err in granting summary judgment for defendant Andrews, as well as defendant Nash-Finch.

[3] As to Caswell Realty's argument that the trial court erred in denying its motion to continue, we cannot hold favorably. Motions to continue pursuant to Rules 56(f) and 40(b) of our Rules of Civil Procedure are granted in the trial court's discretion. *Florida National Bank v. Satterfield*, 90 N.C. App. 105, 367 S.E.2d 358 (1988) (applying the abuse of discretion standard in the review of a Rule 56(f) motion for continuance); *Spence v. Jones*, 83 N.C. App. 8, 348 S.E.2d 819 (1986) (applying the abuse of discretion standard in the review of a Rule 40(b) motion for continuance). Absent an abuse of discretion, the court's ruling will not be disturbed on appeal. *Satterfield*, 90 N.C. App. 105, 367 S.E.2d 358; *Spence*, 83 N.C. App. 8, 348 S.E.2d 819. A thorough review of the record fails to reveal any abuse of discretion by the court below, and therefore, Caswell Realty's argument fails.

In light of all of the foregoing, we conclude that the trial court properly granted defendants' motions for summary judgment and properly denied Caswell Realty's motion to continue. Accordingly, the 8 August 1996 order of the trial court is affirmed.

Affirmed.

Judges EAGLES and MARTIN, John C., concur.

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[128 N.C. App. 722 (1998)]

STATE OF NORTH CAROLINA v. CAREY LEE CLARK

No. COA96-1374

(Filed 3 March 1998)

1. Evidence and Witnesses § 930 (NCI4th)— hearsay—present sense impression exception—closeness in time

The trial court did not err in a prosecution for first-degree murder by allowing defendant's sister-in-law to testify about statements made about defendant by his now deceased mother, including defendant's statement that he would kill the victim. Defendant's mother made the statements after observing defendant's behavior and walking to her daughter-in-law's house next door; the statements were close enough in time to her perception of defendant's statements to be considered immediately thereafter and the present sense impression exception to the hearsay rule applies. N.C.G.S. § 8C-1, Rule 803(1).

2. Evidence and Witnesses § 2967 (NCI4th)— murder—statements by prosecuting witnesses showing bias—excluded—error

The trial court erred in a prosecution for first-degree murder by excluding testimony regarding statements made by two of the State's witnesses which would tend to show their bias. A defendant in North Carolina may always challenge the credibility of a prosecuting witness who testifies against him. Defendant showed a reasonable possibility of a different result if the trial court had introduced the evidence because it related to the overt and malevolent bias of witnesses on whose testimony the State largely relied to make its case.

Appeal by defendant from judgment entered 28 March 1997 by Judge Loto G. Caviness in Avery County Superior Court. Heard in the Court of Appeals 21 August 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Clarence J. Delforge, III, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Constance H. Everhart, Assistant Appellate Defender, for defendant-appellant.

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WYNN, Judge.

During Carey Lee Clark's trial for first-degree murder, the trial judge allowed Ivalee Clark to testify about statements made by Carey's deceased mother but excluded testimony from Mary Hodges that tended to show that the prosecuting witnesses were biased against him. Because the testimony of Ivalee Clark came within the meaning of the present sense impression exception to the hearsay rule, we affirm the admission of her testimony. However, because our Supreme Court held in *State v. Wilson* that a defendant is entitled to offer evidence of the bias of the prosecuting witnesses, we reverse the trial court's decision to exclude the testimony of Mary Hodges.

In 1981, someone killed Kenneth George Davis. Before Carey Clark's arrest some 15 years later, no suspect had been arrested for the murder.

The record reveals that Davis had earned his living by driving residents of rural Avery County to their jobs. On the morning of 18 June 1981, Davis did not show up on his regularly scheduled route. When Sheriff's deputies arrived at his apartment at approximately 6:30 a.m., he was found shot to death in front of his apartment doorway. An autopsy determined that he had died from multiple shotgun wounds, and evidence at the scene indicated that he was murdered while exiting his apartment.

In 1995, an anonymous tip to the Avery County Sheriff's Department lead Detective Jeff Clark to interview several witnesses, including some of Carey's relatives. That investigation lead to Carey's arrest.

At trial, the State's case included testimony by several of Carey's relatives about inculpatory acts and statements made by him. Those witnesses testified that at the time of Davis' death, Carey and his wife were having financial difficulties; Carey became upset because Davis had threatened to stop driving his wife to work because they had not paid him; the day before Davis' body was found, Carey was overheard saying that he was going to kill Davis; and he did not come home the night before the body was discovered. The witnesses further stated that on the morning that the body was found, they overheard Carey saying that he had been lying in wait for someone and had shot and killed someone; after the body was discovered, Carey made other inculpatory statements, namely that he was going to kill various other

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people like he had killed Davis, and that he had destroyed the murder weapon in a stove.

Carey denied involvement with Davis' death and said that he was being set up by his sister, Patricia Allen. His evidence tended to show that he was being framed by his family; when his mother died at some time after the shooting, she left land to his sister, Patricia "Margie" Allen and his brother, Howard Clark with a condition that Carey could live on the land for as long as he behaved to the satisfaction of Patricia Allen; shortly before the anonymous tip to the Sheriff's Department, Carey had a dispute with Patricia and Howard, and Patricia had an ejectment action taken out against him.

Following conviction by a jury, the trial court sentenced Carey to life in prison. He now appeals to this Court.

I.

[1] Carey Lee Clark first argues that the trial court erred by allowing his sister-in-law, Ivalee, to testify about statements made by his now deceased mother, Lona Clark. Because the hearsay testimony came within the meaning of the present sense impression exception to the hearsay rule, we hold that there was no error in admitting the statements.

Ivalee testified that Lona Clark came to her home the day before Davis's body was found; Lona's face was red and she was picking her teeth, a nervous habit that she had when upset; Lona indicated she was not sick and that:

[it] had been the worst day of her life. That Carey Lee had been there and he had been fussing all day and that he called the light company and he had really cussed them out. They had cut his power off. Then she said he had started on Ken Davis because he had put Laura off the van. He had quit letting her ride the van and said he was going to kill Ken.

The trial court ruled that this testimony was admissible under three different hearsay exceptions: (1) present sense impression, (2) excited utterance, and (3) then existing mental, emotional, or physical condition.

Under Rule 803(1), the present sense impression exception to the hearsay rule, a witness may testify to "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." N.C. Gen.

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Stat. § 8C-1, Rule 803(1) (1991). There is no rigid rule about how long is too long to be “immediately thereafter.” *State v. Cummings*, 326 N.C. 298, 314, 389 S.E.2d 66, 75 (1990).

In *State v. Cummings*, the declarant drove from her home to her mother’s house crying and made a statement that the defendant had kicked her out of his house. In that case, the Court found that the statement made after the trip was made sufficiently close to the event to be admissible as a present sense impression. *Id.*

In this case, after observing Carey’s behavior, Lona Clark walked from her home to her daughter-in-law’s house next door. Following the reasoning in *Cummings*, we hold that the statements made by Lona Clark were made sufficiently close in time to her perception of Carey’s statements to be considered “immediately thereafter,” and thus the trial court did not err by admitting them. Because we hold that this exception applies, we need not consider whether the statement would have been admissible on another basis.

II.

[2] Carey Lee Clark next argues that the trial court committed reversible error by excluding the testimony of his cousin Mary Hodges. She proffered testimony on *voir dire* regarding alleged statements made by two of the State’s witnesses, Carey’s sisters Leowana and Patricia, that would tend to show their bias if it was believed that the statements were made. Both sisters testified at trial about incriminating statements made by Carey. Because it was error to exclude testimony about the bias of a prosecuting witness, we grant Carey a new trial.

During Carey’s offer of proof, Mary Hodges testified that on 5 June 1995 she received a telephone call from Leowana. The substance of the conversation was that Carey’s family was attempting to frame him for murder, and Leowana specifically mentioned that Patricia was involved. Mary Hodges also testified that she had a telephone conversation with Patricia in April of 1995 regarding the ejectment action Patricia and her husband had brought to have Carey removed from their property. Carey was out on bond at the time, and according to Hodges, Patricia called her to ask if she had contributed to Carey’s bond. Mary Hodges replied that she did not understand what she was talking about, but offered to call the Avery County Sheriff’s department to find out who signed Carey’s bond. On learn-

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ing that Carey had signed his own bond, Patricia said, "what would it take to keep Carey Lee in jail?" The trial court did not allow Mary Hodges to testify.

In North Carolina, a defendant may always challenge the credibility of a prosecuting witness that testifies against him. *State v. Wilson*, 269 N.C. 297, 152 S.E.2d 223, 225 (1967) (quoting *State v. Armstrong*, 232 N.C. 727, 728, 62 S.E.2d 50, 51 (1950)). In *State v. Wilson*, the defendant was charged with committing incest with his 14-year-old daughter, who was the prosecuting witness. The defendant offered testimony from a neighbor about statements made by his daughter that tended to show that she was biased against him and had a motive to have him put in prison. The Court held that the trial court's exclusion of this evidence entitled the defendant to a new trial. *Id.*

The present case is controlled by the holding of *Wilson*. In both cases, testimony from a prosecuting witness tended to incriminate the defendant. In both cases, the defense was prepared to offer testimony of statements made by the prosecuting witnesses that tended to show bias and a desire to harm the defendant. And in both cases, the defendant was prevented from presenting that evidence.

Furthermore, as the excluded evidence related to the overt and malevolent bias of witnesses on whose testimony the State largely relied to make its case, we conclude that the defendant has shown a reasonable possibility of a different result if the trial court had introduced the evidence. See N.C. Gen. Stat. § 15A-1443(a) (1997); see also *State v. Helms*, 322 N.C. 315, 367 S.E.2d 644 (1988) (holding that trial court committed reversible error when it excluded evidence of acts by prosecuting witness tending to indicate prosecuting witness's bias). Therefore, we are compelled to grant the defendant a new trial.

III.

After considering the defendant's other arguments, we conclude that they are meritless or are unlikely to arise in a new trial. Accordingly, we decline to address them. Furthermore, although the defendant has made a motion for appropriate relief based on the recanted testimony of one of the State's witnesses, Leowana Wortman, we do not need to remand for fact finding because we are granting him a new trial. With the motion for appropriate relief, the defendant also asked that we enjoin the prosecution's witnesses from

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harassing Leowana. Because the trial court is the proper forum for such a motion, we decline to grant that relief. The defendant may renew his request at the trial court level if he so desires.

NEW TRIAL.

Judges GREENE and MARTIN, Mark D., concur.

AMERICAN GREETINGS CORPORATION, J.O. TOMS AND WIFE, EUNICE H. TOMS, J. DONALD TOMS, FREDERIC E. TOMS, AND RANDY C. TOMS, PETITIONERS V. THE TOWN OF ALEXANDER MILLS, A NORTH CAROLINA MUNICIPAL CORPORATION, RESPONDENT

No. COA97-617

(Filed 3 March 1998)

Municipal Corporations § 58 (NCI4th)— annexation—tract insufficiently urbanized

The trial court erred by affirming an annexation ordinance where petitioners met their burden of showing by competent evidence that the Town failed to comply with the subdivision test requirement under N.C.G.S. § 160A-36(c). The 4.29 acre tract (one of two tracts sought to be annexed) was not sufficiently urbanized to satisfy statutory requirements; furthermore, there is an insufficient need to justify a need for annexation under the *Report of the Municipal Government Study Commission* (which the General Assembly considered before enacting Chapter 160A) in that the 33.53 acre farm of which the 4.29 acres is a part contains two occupied houses surrounded by acres of fields.

Appeal by petitioners from judgment entered 19 December 1996 by Judge Zoro J. Guice, Jr. in Rutherford County Superior Court. Heard in the Court of Appeals 13 January 1998.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Albert L. Sneed, Jr. and Craig D. Justus, for petitioners-appellants.

Herbert L. Hyde; and Arledge, Oglesby, Williams, Martelle, L.L.P., by Richard P. Williams and Robert K. Martelle, for respondent-appellee.

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WALKER, Judge.

The petitioners in this action both own property adjacent to the respondent Town of Alexander Mills (the Town). American Greetings, Inc. (AGI) is the owner of a 26.31 acre tract of land on which it operates an industrial manufacturing facility. J. Donald Toms, Frederic E. Toms and Randy C. Toms are the owners of a 33.53 acre farm (the Toms farm) which they acquired in 1986 from their parents, J.O. Toms and Eunice H. Toms, with the parents reserving a life estate for themselves. Since the conveyance, two residences have been maintained on the property, the main residence in which the parents reside and a tenant house which was rented to a family of eight for a number of years.

The Town is a municipal corporation in Rutherford County, North Carolina with a population of less than 5,000 persons. As such, its actions are governed by Chapter 160A, Article 4A, Part 2 of the North Carolina General Statutes. *See* N.C. Gen. Stat. §§ 160A-33 *et seq.* (1994).

On 10 July 1995, the Town adopted a Resolution of Intent to Annex pursuant to N.C. Gen. Stat. § 160A-37 (1994). The property it sought to annex included a total of 30.6 acres, consisting of the entire 26.31 acre AGI tract and 4.29 acres from the Toms farm.

The Town then filed a report of plans for the extension of city services to the proposed annexation area pursuant to N.C. Gen. Stat. § 160A-35 (1994) which complied with the statutory requirements on its face. Following a public hearing on the proposed annexation, the Town's Board of Alderman enacted the ordinance on 11 September 1995. The petitioners appealed to the superior court pursuant to N.C. Gen. Stat. § 160A-38(a) (Cum. Supp. 1997) for judicial review of the ordinance. After a non-jury trial, the superior court entered an order upholding the Town's annexation ordinance. The petitioners then appealed to this Court pursuant to N.C. Gen. Stat. § 160A-38 (h) (Cum. Supp. 1997).

In 1957 the North Carolina General Assembly created the Municipal Government Study Commission (the Commission) to study, among other things, the increasing difficulties experienced by municipalities across the state in providing for their sound economic development and growth under existing laws. N.C. Sess. Laws H.R.J. Res. 51 (1957).

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The Commission issued two reports which were dated 1958 and 1959. In these reports, the Commission expressed concern for the need to balance the rights of property owners against the need for "soundly-governed, financially stable, attractive-to-live-in cities, with a high quality of municipal services." *Report of the Municipal Government Study Commission*, p. 6 (Supp. 1959). After examining the problems experienced by certain "case study cities," the Commission made recommendations on a new annexation procedure which would take into consideration these concerns. One such recommendation was that "[t]he land must be presently developed for urban purposes or undergoing urban development," meaning that:

- (1) there has been substantial subdivision of land into lots and tracts of five acres or less, and/or (2) there has been substantial residential, commercial or industrial development along the streets or highways or in small communities, settlements or subdivision, and/or (3) there is a reasonable expectation that land not already subdivided or developed will soon be developed by reason of being a logical service area into which municipal water and sewer systems should be extended, or by reason of being adjacent to land now subdivided or developed for urban purposes.

Id. at p. 11. However, the Commission found that a municipality should not attempt to annex "large tracts of agricultural or vacant land where no evidence of urban development can be shown." *Id.*

After considering the Committee's reports, the General Assembly enacted legislation in 1959, now found in Chapter 160A of the North Carolina General Statutes, which announced that "sound urban development is essential to the continued economic development of North Carolina," and that municipal boundaries should be extended in order to provide governmental services to areas being used intensively for residential, commercial, industrial, institutional and governmental purposes in order to protect the health, safety and welfare of citizens in those areas. N.C. Gen. Stat. § 160A-33 (1994). However, the authority of a municipality to expand its boundaries is not unlimited and must be exercised in accordance with specific statutory requirements. *See R.R. v. Hook*, 261 N.C. 517, 520, 135 S.E.2d 562, 565 (1964); *see also Huntley v. Potter*, 255 N.C. 619, 627, 122 S.E.2d 681, 686 (1961).

When a party appeals from a municipality's adoption of an annexation ordinance, and there is a *prima facie* showing of substantial

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compliance with the applicable statute, the party opposing annexation has the burden of showing, by competent evidence, that the municipality failed to substantially comply with the statutory requirements. *Thrash v. City of Asheville*, 327 N.C. 251, 255, 393 S.E.2d 842, 845 (1990). "Substantial compliance means compliance with the essential requirements of the Act." *Id.* (Citation omitted).

The applicable statute here is N.C. Gen. Stat. § 160A-36, which provides in pertinent part:

(a) A municipal governing board may extend the municipal corporate limits to include any area which meets the general standards of subsection (b), and which meets the requirements of subsection (c).

. . .

(c) The area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size. . . .

N.C. Gen. Stat. § 160A-36 (1994).

Subsection (c) of the statute contains two tests for determining the availability for annexation, the "use test" and the "subdivision test." *Lithium Corp. V. Bessemer City*, 261 N.C. 532, 538, 135 S.E.2d 574, 579 (1964). Under the use test, the municipality must show that at least 60% of the lots and tracts in the proposed area are actually being used for other than agricultural purposes, *i.e.*, residential, commercial, industrial, governmental or institutional purposes. *Id.* Under the subdivision test, the municipality must show that at least 60% of the acreage, not counting the acreage being used for commercial, industrial, governmental or institutional purposes, consists of lots and tracts of five acres or less in size. *Id.* In this appeal, we are presented with the question of whether the Town has substantially complied with the subdivision test requirement of the statute.

When applying the subdivision test, "the central inquiry is the degree of actual urbanization of the proposed area." *Shackelford v.*

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City of Wilmington, 490 S.E.2d 578, 583 (N.C. Ct. App. 1997). This Court has held:

[T]he accuracy of a subdivision test must reflect actual urbanization of the proposed area. The [Town's] subdivision test calculations must reflect actual urbanization, not reliance on some artificial means of making an annexation appear urbanized.

Asheville Industries, Inc. v. City of Asheville, 112 N.C. App. 713, 719, 436 S.E.2d 873, 877 (1993) (citation omitted). Therefore, in order for the Town to comply with the statutory requirements, there must exist some "actual, minimum urbanization" of the proposed annexation property. *Thrash v. City of Asheville*, 327 N.C. at 257, 393 S.E.2d at 846.

In *Shackelford v. City of Wilmington*, *supra*, this Court was confronted with a similar issue. There, the City of Wilmington enacted an annexation ordinance which included certain property referred to as the "Landfall Property." Petitioners contended that in order for land to be considered subdivided, "it must be subdivided into lots that 'are located on streets laid out and open for travel and [that] have been sold or offered for sale as lots'" in accordance with N.C. Gen. Stat. § 105-287 (d) (1997). 490 S.E.2d at 582. However, this Court found sufficient evidence of urbanization, in that the "Landfall Property" was actively being developed; final subdivision plats had been recorded which showed the entire area as being subdivided into lots and tracts five acres or less in size; and, twelve of the lots had already been sold. *Id.* at 583.

The facts of this case are inapposite to those of *Shackelford v. City of Wilmington*, in that the 4.29 acre tract is not currently under active development; a plat has never been recorded by either party which shows the subdivision of the Toms farm into lots and tracts of five acres or less in size; and, there is no evidence that the Toms family intends to sell any portion of the farm. Therefore, the 4.29 acre tract is not sufficiently "urbanized" to satisfy the statutory requirements.

We find further support for this in the Commission's 1958 report. There, the Commission suggested that in determining whether property was ripe for annexation, "[t]here [was] competent evidence to suggest that the average population density justifying the need for [annexation] is from one to two dwellings per acre, or from four to eight persons per acre." *Report of the Municipal Government Study Commission*, p. 11 (1958); see also *Rogers v. Municipal City of*

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Elkhart, 1997 WL 739470 (Ind. 1997) (where the Court noted that property may be characterized as urban if “[t]he resident population density of the territory sought to be annexed is at least three (3) persons per acre.” *Id.* at 2). In this case, the 33.53 acre Toms farm contains two occupied houses surrounded by acres of fields. This is not sufficient to justify a need for annexation of the 4.29 acre tract.

After a careful review of the record, we conclude that the petitioners have met their burden of showing by competent evidence that the Town has failed to comply with the subdivision test requirement under N.C. Gen. Stat. § 160A-36 (c), and the trial court erred in affirming the annexation ordinance.

Reversed.

Judges EAGLES and WYNN concur.

IN THE MATTER OF: KRYSTAL NICOLE PHILLIPS

No. COA97-581

(Filed 3 March 1998)

**1. Constitutional Law § 172 (NCI4th)— school suspension—
subsequent larceny prosecution—not double jeopardy**

The trial court did not err by denying a juvenile's motion to dismiss a summons and petition alleging that she had stolen money belonging to her school based upon double jeopardy where she had been suspended from school for ten days after being found in possession of the money at school. Under North Carolina law, suspension and expulsion from school for violation of school policies are not punishment invoking the protection of constitutional double jeopardy restrictions.

**2. Evidence and Witnesses § 1229 (NCI4th)— juvenile—theft
of money at school—assistant principal not an agent of law
enforcement—statement not suppressed**

The trial court did not err by denying a juvenile's motion to suppress inculpatory statements and the fruits thereof obtained during questioning by an assistant principal about money stolen from the school. The assistant principal was not a sworn law enforcement officer, had no arrest power, was not affiliated with

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an law enforcement agency, did not act as an agent of law enforcement but as an official of the school, and did not question the juvenile to obtain information for criminal proceedings but for school disciplinary purposes.

3. Larceny § 110 (NCI4th)—theft of money at school—juvenile found with money—evidence of larceny—sufficient

The trial court did not err by finding that a juvenile had committed larceny where a bank bag was stolen from a school office and the juvenile knew where the money was located and had possession of it recently after the theft.

Appeal by juvenile from order entered 3 January 1997 by Judge Edgar B. Gregory in Ashe County District Court. Heard in the Court of Appeals 28 January 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Michelle Bradshaw, for the State.

Don Willey for juvenile-appellant.

MARTIN, Mark D., Judge.

The juvenile, Krystal Nicole Phillips (Phillips), appeals from order adjudicating her a delinquent.

The evidence presented to the trial court tended to show the juvenile, Krystal Nicole Phillips, attended Beaver Creek High School (Beaver Creek), a public school in North Carolina. On the morning of 4 October 1996, Howard Pierce (Pierce), Beaver Creek's assistant principal, observed a bank bag containing the school's cash and checks stored under a counter in the school office. During lunch, Pierce saw Phillips enter the school office and approach the main counter while a secretary left the bank bag unattended. When the secretary returned, Phillips exited the office.

The secretary then discovered the bank bag and money were missing. When Pierce began to search for the missing money, he observed Phillips leaving the girls' restroom. Pierce and a female teacher entered the restroom and found the bank bag in a trash can. After discovering the empty bank bag, Pierce talked with Phillips and requested she lead him to the money. Phillips then went inside a bathroom stall and returned with the cash and checks.

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Because Phillips was not given permission to remove the bank bag and its contents, school authorities suspended her from school for ten days. After the suspension, Phillips returned to school.

On 5 December 1996 Ashe County Clerk of Superior Court issued a juvenile summons and petition alleging Phillips unlawfully, wilfully, and feloniously stole, took or carried away coins, cash and checks valued at \$5,277.00 belonging to Beaver Creek. At the hearing on 3 January 1997, the trial court denied the juvenile's motions to dismiss the petition based on double jeopardy and to suppress the juvenile's statements to Pierce. In an order issued 3 January 1997, the trial court determined the juvenile committed larceny. As a result, the trial court adjudicated Phillips a juvenile delinquent and placed her on juvenile probation for one year.

On appeal, the juvenile contends the trial court erred by (1) denying the juvenile's motion to dismiss; (2) denying the juvenile's motion to suppress her inculpatory statements; and (3) finding the State proved beyond a reasonable doubt that the juvenile committed larceny.

I.

[1] The juvenile first contends the trial court erred by denying her motion to dismiss. Specifically, the juvenile contends the trial court's adjudication placed her in double jeopardy because the public school had previously punished her for the same offense by suspending her from school for ten days.

The Double Jeopardy Clause of the United States Constitution prevents any person from being punished more than once for the same offense. U.S. Const., amend. V. The Double Jeopardy Clause "protects . . . against the imposition of *multiple* criminal punishments for the same offense . . . when such occurs in successive proceedings." *Hudson v. U.S.*, 118 S. Ct. 488, 493, 139 L. Ed. 2d 450, — (1997) (emphasis in original) (citations omitted). The protection of the Double Jeopardy Clause applies to juvenile proceedings and attaches when the judge, as trier of fact, begins to hear evidence. *Breed v. Jones*, 421 U.S. 519, 531, 95 S. Ct. 1779, 1787, 44 L. Ed. 2d. 346, 356-357 (1975).

However, under North Carolina law, suspension and expulsion "from a school for violation of school policies [are] not punishment so as to invoke the protection of constitutional double jeopardy restrictions." *State v. Davis*, 126 N.C. App. 415, 421, 485 S.E.2d 329,

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333 (1997). Instead, the primary goal of suspension and expulsion is to protect the student body. *Id.* at 420, 485 S.E.2d at 332. "Any punishment that a particular child suffers is merely incidental to the purpose of protecting the school community as a whole." *Id.*

In the present case, the trial court did not err by denying the juvenile's motion to dismiss. Because the juvenile was only suspended from school, double jeopardy restrictions do not prevent the trial court from imposing its sentence. Accordingly, the juvenile's contention is without merit.

II.

[2] The juvenile further contends the trial court erred by denying her motion to suppress her inculpatory statements and the fruits thereof obtained during questioning by the assistant principal.

Statements obtained as a result of custodial interrogation without *Miranda* warnings are inadmissible. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706, *reh'g denied*, 385 U.S. 890, 87 S. Ct. 11, 17 L. Ed. 2d 121 (1966). A custodial interrogation is one "initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*

A custodial interrogation may be conducted by an individual who acts as an agent of law enforcement but is not an officer. *State v. Morrell*, 108 N.C. App. 465, 470-471, 424 S.E.2d 147, 151, *disc. review denied*, 333 N.C. 465, 427 S.E.2d 626 (1993). However, free and voluntary statements made without *Miranda* warnings to private individuals unconnected with law enforcement are admissible at trial. *Id.* at 470, 424 S.E.2d at 150-151.

Because the juvenile in the instant case was not questioned by a law enforcement officer or its agent, the trial court did not err by admitting the juvenile's statements and the fruits thereof. Specifically, when questioning Phillips, Pierce did not act as an agent of law enforcement but as an official of the school. Pierce was not a sworn law enforcement officer, he had no arrest power, and was not affiliated with any law enforcement agency. Moreover, Pierce did not question the juvenile to obtain information to use in criminal proceedings but questioned her simply for school disciplinary purposes. Accordingly, the juvenile's contention is without merit.

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III.

[3] Finally, the juvenile contends the trial court erred by finding the State proved the juvenile committed larceny beyond a reasonable doubt.

"The essential elements of larceny are that [the juvenile] (1) took the property of another and (2) carried it away (3) without the owner's consent (4) with the intent to deprive the owner of the property permanently." *State v. Lively*, 83 N.C. App. 639, 641, 351 S.E.2d 111, 113 (1986), *disc. review denied*, 319 N.C. 461, 356 S.E.2d 10 (1987). "[T]he essential facts can be proved by circumstantial evidence where the circumstance raises a logical inference of the fact to be proved and not just a mere suspicion or conjecture." *State v. Boomer*, 33 N.C. App. 324, 327, 235 S.E.2d 284, 286, *disc. review denied*, 293 N.C. 254, 237 S.E.2d 536 (1977).

A person found in unexplained possession of recently stolen property is presumed to be the thief if (1) the property is stolen, (2) the property stolen was possessed by the accused, and (3) the accused possessed the stolen property recently after the larceny. *State v. Foster*, 268 N.C. 480, 485, 151 S.E.2d 62, 66 (1966). Simply, "'the [accused's] possession of the fruits of the crime recently after its commission [justify] the inference of guilt on his trial for larceny.'" *State v. Knight*, 261 N.C. 17, 26, 134 S.E.2d 101, 107 (1964) (quoting *State v. Best*, 232 N.C. 575, 577, 61 S.E.2d 612, 613 (1950)). However, the accused does not have to physically possess the stolen property; instead, it is "sufficient if the property was under his exclusive personal control." *Foster*, 268 N.C. at 487, 151 S.E.2d at 67.

In the present case, there is sufficient evidence in the record to support the trial court's determination that the juvenile committed the offense of larceny. Specifically, Pierce last saw the bank bag containing money approximately thirty minutes before it was stolen. He later observed Phillips in the main office standing alone within three feet of the unattended bank bag. When the school secretary returned to attend the bank bag, Phillips exited the office. Thereafter, the secretary discovered the bank bag was missing.

When Pierce was notified the bank bag was missing, he found the empty bank bag in the girls' bathroom where he had observed Phillips after she left the office. When Pierce questioned Phillips, Phillips returned to the bathroom and revealed where the money was hidden.

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Because Phillips knew where the money was located and had possession of it recently after the theft, the trial court's determination that the juvenile committed larceny is supported by sufficient evidence. Accordingly, the juvenile's contentions are without merit.

Affirmed.

Judges GREENE and JOHN concur.

CILFTON I. DAUGHTRY, PLAINTIFF v. LOUISE N. DAUGHTRY, DEFENDANT

No. COA97-591

(Filed 3 March 1998)

Divorce and Separation § 8 (NCI4th)—separation agreement—disclosure obligation—governed by agreement

The trial court correctly dismissed defendant's counterclaims pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff filed for absolute divorce and defendant counterclaimed based on allegations including fraud and breach of contract, alleging that plaintiff had falsely represented in paragraph 20 of the separation agreement that he had fully disclosed all marital assets and that the division of assets in the agreement was fair. Even assuming that plaintiff did not fully disclose information regarding his properties and finances, paragraph twenty of the agreement requires a full and accurate disclosure only with respect to the information requested and there is no contractual language that obligates the parties to make a full disclosure with respect to all marital property. Defendant's argument that every spouse as a party to a separation or property settlement agreement has an affirmative obligation to make a full and accurate disclosure of his or her assets and debts is rejected; the duty to disclose is governed by the agreement when the parties are not in a confidential relationship at the time of the agreement.

Appeal by defendant from order filed 25 September 1996 by Judge William A. Christian and from order filed 26 November 1996 by Judge Albert A. Corbett, Jr. in Johnston County District Court. Heard in the Court of Appeals 14 January 1998.

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Daughtry, Woodard, Lawrence & Starling, L.L.P., by Stephen C. Woodard, Jr. and Edward P. Hausle, P.A., by Edward P. Hausle, for plaintiff appellee.

Mast, Schulz, Mast, Mills & Stem, P.A., by George B. Mast, Bradley N. Schulz, and Christie C. Stem, for defendant appellant.

GREENE, Judge.

Louise N. Daughtry (defendant) appeals from an order of the trial court dismissing her counterclaims against Clifton I. Daughtry (plaintiff) pursuant to Rule 12(b)(6).

The facts are as follows: the plaintiff and the defendant were married on 20 August 1971 and separated on 28 March 1994. On 21 December 1994, the plaintiff and the defendant signed a separation and property settlement agreement (Agreement) in which the defendant waived any claims she may have had for post-separation support, alimony, and equitable distribution. Each party was represented by an attorney in the negotiation of the Agreement. Paragraph twenty of the separation agreement provided in pertinent part as follows:

FULL DISCLOSURE: Each party warrants, . . . that each has fully and completely discharged all information regarding property and finances requested by the other and that no information of any such nature has been subjected to distortion or in any manner misrepresented. Each party warrants and acknowledges that he or she fully acknowledges that this [A]greement is reasonable, fair, and equitable in light of all the circumstances of the parties, the financial conditions of each of the parties, the indebtedness of the estates, and the conditions as set forth in North Carolina General Statute 50-20. Each of the parties waives any further disclosure or right to seek disclosure within this matter.

On 21 December 1994, the defendant also filed a stipulation of voluntary dismissal with prejudice of a complaint filed on 12 October 1994 in which she had asked for alimony, equitable distribution, child custody, and child support.

On 23 April 1996, the plaintiff filed for absolute divorce. In June of 1996, the defendant filed an answer and counterclaimed for damages based on claims of fraud and breach of contract, alleging that in paragraph twenty of the Agreement, "the plaintiff [falsely] represented to the defendant that he had fully disclosed to the defendant

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all assets which were marital assets, and that the division of the assets set forth in the [A]greement was fair." The defendant also alleged she was entitled to have the Agreement declared null and void based on her claims for breach of fiduciary duty, undue influence, mutual mistake, and on the basis that the Agreement was unconscionable. Finally, she sought, by way of counterclaims, post-separation support, alimony, equitable distribution, and attorney fees in the event the Agreement was declared null and void.

Judge William A. Christian (Judge Christian) dismissed the defendant's counterclaims for post-separation support, alimony, attorney fees, and equitable distribution on the grounds she had previously asserted these claims in her 12 October 1994 complaint and had taken a voluntary dismissal with prejudice of those claims. Judge Christian allowed the defendant's motion to compel discovery on the other counterclaims. Prior to completion of the discovery, however, Judge Albert A. Corbett, Jr. (Judge Corbett) dismissed the remaining counterclaims pursuant to Rule 12 "after reviewing the pleadings and pertinent case law"

The defendant appealed the dismissals entered by Judge Christian and Judge Corbett. In oral argument to this Court, however, the defendant conceded the correctness of Judge Christian's order and further indicated that she was not, therefore, seeking to have the Agreement declared null and void. Her argument on appeal is that she has alleged a claim for relief based on the plaintiff's breach of the terms of the Agreement and that she is therefore entitled to damages.

The dispositive issue is whether the language of paragraph twenty of the Agreement can support the defendant's claim that the plaintiff represented to her that "he had fully disclosed to the defendant all assets which were marital assets, and that the division of assets . . . was fair."

Paragraph twenty of the Agreement is central to the defendant's claims that the plaintiff has made false and fraudulent representations to her. The defendant contends that in paragraph twenty of the Agreement the plaintiff "represented . . . that he had fully disclosed . . . all assets which were marital." The plaintiff contends that "[n]owhere in [p]aragraph 20 of the Agreement does [the plaintiff] represent that he has made a full disclosure of all marital assets." We agree with the plaintiff. Paragraph twenty of the Agreement is nothing more than an acknowledgment by each party that each of them

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has "fully and completely discharged all information regarding property and finances requested by the other." There is no contractual language that obligates the parties to make a full disclosure with respect to all marital property. A full and accurate disclosure is required only with respect to that information requested. Indeed, each party waived any right to seek disclosure beyond that requested: "Each of the parties waives any further disclosure or right to seek disclosure . . ." In this case, the defendant does not allege that the plaintiff distorted or misrepresented information regarding property and finances *requested by her*. Thus, even assuming the plaintiff did not fully disclose to the defendant information regarding his properties and finances, there has been no breach of contract or fraud.¹ The trial court, therefore, correctly dismissed the defendant's counterclaims pursuant to Rule 12(b)(6).² See *Barnaby v. Boardman*, 70 N.C. App. 299, 302, 318 S.E.2d 907, 909 (1984) (Rule 12(b)(6) motion requires trial court to determine whether allegations give rise to any claim), *reversed on other grounds*, 313 N.C. 565, 330 S.E.2d 600 (1985).

In so holding we reject the defendant's argument that every spouse as party to a separation and/or property settlement agreement has an affirmative obligation to make a full and accurate disclosure of his or her assets and debts. Our Court has held that when the parties are in a confidential relationship "there is a duty to disclose all material facts, and failure to do so constitutes fraud" supporting avoidance of the agreement or damages. *Harroff v. Harroff*, 100 N.C. App. 686, 690, 398 S.E.2d. 340, 343 (1990), *disc. review denied*, 328 N.C. 330, 402 S.E.2d 833 (1991). When the parties are not in a confidential relationship at the time of the negotiation of the agreement(s), the duty to disclose is governed by the agreement(s). When the parties are not in a confidential relationship and there is no language in the agreement(s) addressing the duty to disclose, inadequate

1. Compare with *Lee v. Lee*, 93 N.C. App. 584, 588, 378 S.E.2d 554, 556 (1989), where the parties to a separation agreement agreed that there had been a full disclosure of assets and the Court held that the failure to disclose the existence of an asset constituted a breach.

2. The fact that the Rule 12 dismissal order was entered by Judge Corbett prior to the completion of the discovery order entered by Judge Christian does not require a different result. A Rule 12 motion is based on the pleadings and whatever evidence may have been subsequently discovered and revealed to the trial court would not have been material. The order entered by Judge Corbett is unambiguous in stating that he considered only the pleadings and we are bound by that entry. Thus, we reject the defendant's argument that the Rule 12 motion was converted into a Rule 56 motion because Judge Corbett considered matters outside the pleadings.

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or fraudulent disclosure by either party in the bargaining process can constitute procedural unconscionability and when combined with substantive unconscionability, justifies relief from the terms of the agreement(s). *See King v. King*, 114 N.C. App. 454, 458, 442 S.E.2d 154, 157 (1994). In this case, both parties had attorneys representing them in the negotiation of the Agreement and thus a confidential relationship did not exist, *Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119, *disc. review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986), and any duty to disclose, therefore, was controlled by paragraph twenty of the Agreement.

Affirmed.

Judges JOHN and MARTIN, Mark D., concur.

STATE OF NORTH CAROLINA v. MICKEY SPELLAIN ADDISON

No. COA97-888

(Filed 3 March 1998)

1. Constitutional Law § 342 (NCI4th)—in-chambers conference—defendant not present—not prejudicial

There was no prejudicial error in a first-degree murder prosecution where the trial court conducted an in-chambers conference with counsel in defendant's absence. The trial court erred by conducting the conference, but defense counsel was instructed to convey the substance of the brief conference to defendant, after which the trial court further elaborated on the nature of the conference in open court in defendant's presence and withheld ruling on the matter until after the parties returned to open court and discussed the matter further. Finally, given defendant's trial strategy, no harm could be discerned.

2. Homicide § 75 (NCI4th)—murder—self-defense—instruction inappropriate

In a first-degree murder prosecution, the Court of Appeals noted that a charge on self-defense would be inappropriate under the circumstances.

Appeal by defendant from judgment entered 8 November 1996 by Judge William C. Gore, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 9 February 1998.

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Attorney General Michael F. Easley, by Assistant Attorney General John F. Maddrey, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant-appellant.

MARTIN, Mark D., Judge.

Defendant appeals from conviction of first degree murder.

A detailed recitation of the facts is not necessary to address the issue presented by this appeal. Briefly, however, the State's evidence tended to show on 30 June 1993, defendant attempted to rob the victim after the victim stopped to withdraw money at a United Carolina Bank ATM machine. During the course of the attempted robbery, defendant shot the victim in the head. Videotapes and still photographs obtained from the ATM machine's closed circuit camera showed defendant shooting the victim, who died instantly from a bullet wound to the left side of his head. In addition, the State presented testimony that defendant subsequently told others he shot the victim.

Defendant's trial strategy was to concede he shot the victim during the course of an attempted robbery, but to claim that under the circumstances he was not guilty of first degree murder. Defendant admitted he shot the victim, but maintained he did so only after the victim reached for his own gun. Fearing the victim might shoot him, defendant shot the victim to defend himself. Still photographs taken from the videotape, however, show defendant grabbing the victim's left wrist and reaching into the car with his right arm to shoot the victim as the victim leaned to the right. Moreover, defendant admitted the victim never actually pointed the gun at him.

On 5 November 1996, a jury convicted defendant, who was tried capitally, of first degree murder under the felony murder rule. After the jury failed to reach a unanimous verdict during the sentencing phase of defendant's trial, the trial court sentenced him to life imprisonment.

[1] On appeal, defendant contends the trial court violated Article I, Section 23 of the North Carolina Constitution by conducting an in-chambers conference outside his presence, thereby entitling him to a new trial.

"It is well settled that Article I, Section 23 . . . guarantees a criminal defendant the right to be present at every stage of his trial." *State*

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v. Boyd, 343 N.C. 699, 718, 473 S.E.2d 327, 337 (1996), *cert. denied*, — U.S. —, 117 S. Ct. 778, 136 L. Ed. 2d 722 (1997). This right, which includes an in-chambers conference with counsel, cannot be waived in capital trials. *Id.*; see also *State v. Williams*, 343 N.C. 345, 361, 471 S.E.2d 379, 387-388 (1996), *cert. denied*, — U.S. —, 117 S. Ct. 695, 136 L. Ed. 2d 618 (1997). Therefore, “it is error for the trial court to conduct a chambers conference with counsel for the State and counsel for defendant in defendant’s absence.” *State v. Daniels*, 337 N.C. 243, 259, 446 S.E.2d 298, 309 (1994), *cert. denied*, 513 U.S. 1135, 115 S. Ct. 953, 130 L. Ed. 2d 895 (1995).

This type of error does not mandate automatic reversal, however, the State carries the burden of demonstrating that the error was harmless beyond a reasonable doubt. *State v. Brogden*, 329 N.C. 534, 541, 407 S.E.2d 158, 163 (1991). When, as here, the in-chambers conference is recorded, the appellate court is able to determine from the record if the error was harmless. See *Williams*, 343 N.C. at 361, 471 S.E.2d at 388 (finding that new trial not warranted where conferences were recorded contemporaneously and defendant was not harmed by his absence); see also *Boyd*, 343 N.C. at 719, 473 S.E.2d at 337.

In the instant case, the trial court erred by conducting an in-chambers conference with counsel in defendant’s absence. However, the trial court’s error does not entitle defendant to a new trial. The circumstances giving rise to the error occurred during the State’s examination of prosecution witness Curtis E. Ellis. The State attempted to impeach Ellis, defendant’s companion on the night the murder occurred, with a prior statement after Ellis deviated from that statement during his testimony. The trial court intervened and sustained its own objection to the State’s questioning. After excusing the jury and conducting a *voir dire* hearing, the trial court asked defense counsel for their position on the matter. When counsel replied “we have no position,” the trial court asked to see counsel in chambers.

In chambers with the court reporter and counsel present, the trial court noted defendant’s absence and directed defense counsel to relay the substance of the conference to defendant “as soon as you talk with him after this recess.” The trial court then stated it could not understand defendant’s position of taking no position. When counsel replied that it involved defense tactics, the trial court simply explained its surprise, provided both defense counsel and the State with a copy of what it believed to be the applicable law, and stated “I will hear from you in open court thereafter.”

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Upon returning to the courtroom, the trial court noted its directive to defense counsel to convey the substance of the conference to defendant and was assured by counsel they had done so. The trial court then made additional inquiries to defense counsel regarding their approach and the trial court's concern that defendant was aware of their position. After further discussion, defense counsel informed the trial court that they did not object to the State's use of the statement.

The record in this case shows the trial court's error was, in fact, harmless beyond a reasonable doubt. Specifically, defense counsel were instructed to, and indicated they did, convey the substance of the brief conference to defendant, after which time the trial court further elaborated on the nature of the conference in open court in defendant's presence. Moreover, the trial court withheld ruling on the matter until after the parties returned to open court and discussed the matter further. *See State v. Williams*, 339 N.C. 1, 31-32, 452 S.E.2d 245, 263-264 (1994) (finding no error where the trial judge did not make a ruling in chambers but explored the issue in open court on the record), *cert. denied*, — U.S. —, 116 S. Ct. 109, 133 L. Ed. 2d 61 (1995). Finally, given defendant's trial strategy, we are unable to discern harm, particularly where Ellis' prior statement tended to support defendant's defense. Therefore, defendant's argument must fail. Defendant received a fair trial free from prejudicial error.

[2] Additionally, we note that a charge on self-defense clearly would be inappropriate under the circumstances. Accordingly, defendant's assignment of error claiming the trial court improperly failed to instruct the jury on voluntary manslaughter, based on a theory of imperfect self-defense in a murder felony case, is without merit.

Although defendant raised numerous assignments of error in the record on appeal, he has abandoned his remaining assignments of error by failing to bring them forward in his brief. N.C.R. App. P. 28(a) (1998).

No error.

Judges GREENE and SMITH concur.

STATE v. FAISON

[128 N.C. App. 745 (1998)]

STATE OF NORTH CAROLINA v. REGINALD LEE FAISON

No. COA97-1009

(Filed 3 March 1998)

Evidence and Witnesses § 3030 (NCI4th)— possession of firearm by felon—name and nature of previous offense—probative value not outweighed by prejudice

The trial court did not err in a prosecution for possession of a firearm by a felon by admitting evidence of previous convictions for assault with a deadly weapon and voluntary manslaughter. Although the official commentary to N.C.G.S. § 8C-1, Rule 403 states that the federal rule is identical to North Carolina's, North Carolina is not bound by *Old Chief v. United States*, 136 L. Ed. 2d, which held that the government's evidence of a prior conviction should have been excluded because petitioner's requested stipulation would have been equal in probative value without the same danger of unfair prejudice. Moreover, defendant did not offer to stipulate that he had a prior felony conviction and did not argue that his stipulation would render evidence of the name and nature of the prior offense inadmissible pursuant to Rule 403. The State in this case had no alternative to introducing evidence of defendant's prior convictions.

Appeal by defendant from judgment entered 6 March 1997 by Judge James D. Llewellyn in Sampson County Superior Court. Heard in the Court of Appeals 24 February 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Claud R. Whitener, III, for the State.

Johnson & Parsons, P.A., by David H. Hobson, for defendant appellant.

GREENE, Judge.

Reginald Lee Faison (Defendant) appeals his conviction for possession of a firearm by a felon.

Defendant was charged with possession of a firearm by a felon, *see* N.C.G.S. § 14-415.1 (Supp. 1996), and communicating threats, *see* N.C.G.S. § 14-277.1 (1993). At trial, Latoya Bennett testified that Defendant had threatened her while holding a firearm in his lap. The State presented evidence showing that Defendant had previous con-

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victions for assault with a deadly weapon with intent to kill and voluntary manslaughter.

At the conclusion of the State's evidence, the trial court dismissed the charge of communicating threats. The jury found Defendant guilty of possession of a firearm by a felon. The trial court sentenced Defendant to a minimum of sixteen months and a maximum of twenty months in prison. Defendant appeals.

The issue is whether the trial court committed plain error by admitting into evidence and instructing the jury that Defendant had previous convictions for assault with a deadly weapon and voluntary manslaughter.

As a general rule, failure to object to alleged errors precludes raising those errors on appeal. N.C.R. App. P. 10(b)(1). To be entitled to relief, the defendant must show that "plain error" was committed. *State v. Walker*, 316 N.C. 33, 37-38, 340 S.E.2d 80, 82-83 (1986). Before granting relief based on the plain error rule, "the appellate court must be convinced that absent the error the jury probably would have reached a different verdict." *State v. Riddle*, 316 N.C. 152, 161, 340 S.E.2d 75, 80 (1986) (quoting *Walker*, 316 N.C. at 39, 340 S.E.2d at 83).

In this case, the State presented evidence that Defendant had been convicted of assault with a deadly weapon and voluntary manslaughter. The trial court instructed the jury that in order to find Defendant guilty of the offense charged (possession of a firearm by a felon) it would have to find beyond a reasonable doubt that Defendant had been convicted of those offenses. Defendant did not object to the introduction of the evidence or to the trial court's instructions.

Defendant contends on appeal that the evidence in question should have been excluded because, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." N.C.G.S. § 8C-1, Rule 403 (1992). In support of his contention, Defendant cites the recent decision of the United States Supreme Court in *Old Chief v. United States*, — U.S. —, 136 L. Ed. 2d 574 (1997) (holding that the petitioner's requested stipulation of his prior conviction would have been equal in probative value to the Government's evidence showing the prior conviction, and the stipulation would have been without the same danger of unfair prejudice inherent in the admission of the name and nature of the prior conviction; therefore the Government's evidence

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of the prior conviction should have been excluded pursuant to Rule 403 of the Federal Rules of Evidence). Although the official commentary to N.C. Gen. Stat. § 8C-1, Rule 403 states that the federal rule is identical to our rule, we nevertheless are not bound by the United States Supreme Court's holding in *Old Chief*. See *State v. Lamb*, 84 N.C. App. 569, 580, 353 S.E.2d 857, 863 (1987) (stating that a non-constitutional decision of the United States Supreme Court cannot bind or restrict how courts in this State interpret and apply North Carolina evidence law), *aff'd*, 321 N.C. 633, 365 S.E.2d 600 (1988).

Even if we determine that the decision in *Old Chief* is instructive and apply its holding to the present case, Defendant's argument is without merit. Defendant, unlike the petitioner in *Old Chief*, did not offer to stipulate that he had a prior felony conviction, nor did Defendant argue that his stipulation would render evidence of the name and nature of the prior offense inadmissible pursuant to Rule 403 of the North Carolina Rules of Evidence. The State in this case, unlike the Government in *Old Chief*, had no alternative but to introduce evidence of Defendant's prior convictions in order to meet its burden of showing an element of the crime charged. Absent an offer of a stipulation or admission to the prior convictions by Defendant, the reasoning of *Old Chief* does not apply. Defendant has failed to show that the probative value of the evidence of his prior convictions was substantially outweighed by the danger of unfair prejudice. The trial court did not commit error, plain or otherwise, by the admission of the evidence or by its instructions to the jury.

No error.

Judges MARTIN, Mark D. and SMITH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 FEBRUARY 1998

ADAMS v. AVX CORP. No. 97-361	Ind. Comm. (313927)	Reversed
AMERICAN CHILDREN'S HOME v. HARLEYSVILLE MUT. INS. CO. No. 97-501	Davidson (96CVS34)	Dismissed
AUTRY v. KELLY-SPRINGFIELD TIRE CO. No. 97-494	Cumberland (96CVS1687)	Affirmed
BALL v. BALL No. 97-499	Brunswick (93CVD903)	Affirmed
BARMORE v. DOCKERY No. 97-354	Cherokee (95CVD315)	Affirmed
CARTER v. PARKER No. 97-228	New Hanover (96CVD3663)	Affirmed
FRENCH BROAD ELEC. MEM. CORP. v. FARMER No. 97-495	Buncombe (95SP0174)	No Error
HAAS v. CORPORATE BENEFITS SERVICES No. 97-355	Ind. Comm. (423546)	Reversed
IN RE STRICKLAND No. 97-546	Robeson (94J006)	Affirmed
LAWSON v. LAWSON No. 97-575	Guilford (92CVD4983)	Affirmed
MARTIN v. ROBERTS No. 97-520	Durham (96CVS00310)	Affirmed
OKWARA v. DILLARD DEPT. STORES No. 97-438	Mecklenburg (94CVS14588)	Affirmed
SEARS v. SEARS No. 97-532	Wake (96CVS09610)	Affirmed
SIGNATURE OUTDOOR ADVERTISING CO. v. GARRETT No. 97-337	Wake (95CVS10782)	Affirmed
STATE v. BRAGG No. 97-95	Watauga (94CRS4929)	No Error

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STATE v. GADDY No. 97-266	Anson (95CRS1790)	No Error
STATE v. GOINS No. 97-488	Onslow (96CRS11591)	Vacated and Remanded
STATE v. HOOVER No. 97-367	Randolph (96CRS719) (96CRS720)	No Error
STATE v. MALETTE No. 97-235	Durham (95CRS30843)	Affirmed and Remanded
STATE v. SHORE No. 97-223	Forsyth (94CRS29940) (94CRS29941) (96CRS22252) (96CRS22253) (96CRS22254)	No Error
STREET v. INTEGRATED SYSTEM SOLUTIONS CORP. No. 97-407	Wake (94CVS12018)	Affirmed
TEXIDOR v. EATHERLY No. 96-1524	Lee (93CVD00539)	No Error
WILLIAMS v. DOROTHEA DIX HOSPITAL No. 97-272	Ind. Comm. (112399)	Affirmed
WOODARD v. RALEIGH CITY COACHLINES No. 97-566	Ind. Comm. (663619) (088311) (409513)	Affirmed
WOODARD v. W. M. WIGGINS & CO. No. 97-234	Ind. Comm. (817319)	Affirmed
WOODWARD v. PIZZA HUT OF NEW BERN No. 96-1077	Halifax (95CVS1010)	Defendants' appeal is dismissed. Plaintiff's motion to dismiss the appeal is granted.

FILED 3 MARCH 1998

ACEY v. MANNS No. 97-579	Guilford (96CVS7147)	Dismissed
BENAVIDEZ v. BOB WEST, INC. No. 97-431	Cumberland (95CVS4058)	Affirmed

BIGGER v. VISTA SALES & MKTG. No. 97-448	Buncombe (95CVS04345)	Affirmed
BRAME v. T. A. LOVING CO. No. 97-614	Ind. Comm. (476368)	Affirmed in part, Reversed in part, and Remanded
BROWN v. LIFFORD No. 97-769	Caswell (96CVS149)	Dismissed
CARTER v. N.C. CONFERENCE OF PENTECOSTAL HOLINESS CHURCH No. 97-243	Johnston (95CVS01989)	Affirmed
CONNELLY v. N.C. FARM BUREAU MUT. INS. CO. No. 97-703	Durham (96CVS936)	Affirmed
DEPT. OF TRANSPORTATION v. BRADSHER No. 97-718	Wake (95CVS7694)	Affirmed
FREEMAN v. WEBB No. 97-792	Cumberland (95CVD5329)	No Error
FRISBEE v. DANA VOLUNTEER FIRE DEPT. No. 97-226	Ind. Comm. (410383)	Affirmed
GRAHAM v. GRAHAM No. 97-586	Moore (83CVD75)	Affirmed
HONEYCUTT v. TURNER No. 97-795	Person (90CVD435)	Affirmed
IN RE ASHBURN No. 96-1301	Stokes (95J1)	Affirmed
IN RE FARRIS No. 97-644	Chatham (96J77) (96J78)	Affirmed
IN RE SMITH No. 97-544	Duplin (91J25) (91J26)	Vacated
MEADS v. N.C. DEPT. OF AGRICULTURE No. 97-537	Wake (96CVS564)	Affirmed in part and Vacated in part
MOORE v. MCWATTY No. 97-696	New Hanover (81CVD1661)	Affirmed

MORTIMER v. BLUE CROSS BLUE SHIELD OF N.C. No. 97-117	Durham (96CVS480)	Affirmed
MOSELEY v. MILLER No. 97-936	Duplin (94CVS0542)	Reversed and Remanded
MURAWSKY v. MURAWSKY No. 97-112	Cumberland (92CVD0158)	Appeal Dismissed
R.J. REYNOLDS TOBACCO CO. v. LIGGETT GROUP No. 97-915	Forsyth (97CVS2173)	Dismissed
ROACH v. N.C. BAPTIST HOSPITAL No. 97-158	Ind. Comm. (348600)	Affirmed
SCHMIDT v. OLINGER No. 97-661	Buncombe (94CVS1520)	Affirmed
SILVIS v. CAROLINA CABLE & CONNECTOR No. 97-469	Ind. Comm. (318040)	Affirmed
SINCLAIR v. KOUNTRY NISSAN No. 97-832	Ind. Comm. (505328)	Affirmed
STATE v. AGE No. 97-738	New Hanover (96CRS9144) (96CRS9145)	No Error
STATE v. ANDERSON No. 97-989	Pender (93CRS2259) (95CRS1756) (95CRS1757) (95CRS1758) (95CRS1759)	Appeal Dismissed
STATE v. BROOKS No. 97-804	Alamance (96CRS24892) (96CRS25069)	Affirmed
STATE v. BROWN No. 96-1526	Cherokee (96CRS1111) (96CRS1112) (96CRS1113) (96CRS1114)	No Error
STATE v. BRYANT No. 97-754	Guilford (96CRS22485) (96CRS30437) (96CRS30438)	No Error
STATE v. BRYANT No. 97-886	Scotland (92CRS8213)	No Error

STATE v. BURNETTE No. 97-931	Durham (96CRS19956)	No Error
STATE v. CARSON No. 97-808	McDowell (95CRS266) (95CRS1215)	No Error
STATE v. CARSON No. 97-905	Carteret (96CRS9519)	No Error
STATE v. COZART No. 97-938	Wake (96CRS63370) (96CRS67833) (96CRS73476)	Remanded for Resentencing
STATE v. EDWARDS No. 97-490	Wilson (96CRS9782)	No Error
STATE v. EDWARDS No. 97-759	Wake (96CRS72675)	Remanded for Resentencing
STATE v. ENOCH No. 97-346	Alamance (96CRS13011)	No Prejudicial Error
STATE v. FARRINGTON No. 97-676	Rowan (95CRS13870) (95CRS13871)	No Error
STATE v. GOLDSTEIN No. 97-858	Mecklenburg (95CRS089395)	No Error
STATE v. HAYES No. 97-433	New Hanover (95CRS30881)	No Error
STATE v. HENRY No. 97-690	Davidson (94CRS17552) (94CRS17553)	No Error
STATE v. HERMS No. 97-855	Cleveland (94CRS7766) (94CRS8260) (94CRS8263)	No Error
STATE v. HIGH No. 97-675	Edgecombe (96CRS8260) (96CRS8261) (96CRS8262) (96CRS8263)	No Error
STATE v. HOLLAND No. 97-666	Forsyth (96CRS4229)	Affirmed
STATE v. JOHNSON No. 97-693	Wake (94CRS74524) (94CRS74525) (94CRS74526)	No Error

STATE v. JONES No. 97-776	Pitt (96CRS14991) (96CRS14992) (96CRS14993)	Affirmed
STATE v. LEE No. 97-1026	Halifax (95CRS9514)	No Error
STATE v. MORGAN No. 97-567	Wake (96CRS44824)	No Error
STATE v. MUFIYD No. 97-562	Craven (96CRS15407) (96CRS15410)	No Error
STATE v. MURRAY No. 97-758	Wake (96CRS50117) (96CRS50118)	Affirmed
STATE v. PHEIFFER No. 97-828	Johnston (96CRS2226)	No Error
STATE v. RANSOM No. 97-153	Duplin (95CRS4430) (95CRS4431)	No Error
STATE v. ROBINSON No. 96-757	Chowan (95CRS1649)	No Error
STATE v. SNIPES No. 97-753	Chatham (96CRS1488) (96CRS1489) (96CRS1490) (96CRS1491) (96CRS1492) (96CRS1493) (96CRS1494) (96CRS1495) (96CRS1123) (96CRS1124) (96CRS1524) (96CRS4124)	Appeal Dismissed
STATE v. STEVONS No. 97-788	Durham (95CRS8023)	Vacated and Remanded
STATE v. TAYLOR No. 97-817	Hertford (96CRS2440)	Affirmed
STATE v. VANLANDINGHAM No. 97-457	Forsyth (96CRS22219)	Affirmed
STATE v. YOUNG No. 97-1035	Guilford (96CRS39238) (96CRS39239) (96CRS39240)	Dismissed

STATE ex rel. GRAHAM v. HENDRICKS No. 97-293	Cumberland (84CVD1903)	Vacated and Remanded
STEM v. RICHARDSON No. 97-658	Granville (94CVS654)	Dismissed
STEWART v. STEWART No. 97-960	Halifax (96CVD670)	Affirmed
WOOSLEY v. MARTIN No. 97-684	Macon (94CVS321)	No Error

APPENDIXES

ORDER ADOPTING RULES FOR MOTIONS
FOR APPROPRIATE RELIEF IN
CAPITAL CASES

ORDER ADOPTING AMENDMENT TO
RULE 4 OF THE
RULES OF APPELLATE PROCEDURE

**Order Adopting Rules
for Motions for Appropriate Relief
in Capital Cases**

Pursuant to the authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are amended by the adoption of a new Rule 25.

Rule 25. Motions for Appropriate Relief in Capital Cases.

When considering motions for appropriate relief in capital cases, the following procedures should be followed:

(1) All appointments of defense counsel should be made by the senior resident superior court judge in each district or the senior resident superior court judge's judicial designee;

(2) All requests for experts, *ex parte* matters, interim attorney fee awards, and similar matters arising prior to the filing of a motion for appropriate relief should be ruled on by the senior resident superior court judge or the senior resident superior court judge's designee; and

(3) All motions for appropriate relief, when filed, should be referred to the senior resident superior court judge or the senior resident superior court judge's designee for the judge's review and administrative action, including, as may be appropriate, dismissal, calendaring for hearing, entry of a scheduling order for subsequent events in the case, or other appropriate actions.

Adopted by the Court in Conference this 7th day of May, 1998. This amendment shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals and shall be effective 1 June 1998.

Orr, J.
For the Court

**Order Adopting Amendment to
Rule 4 of the Rules of Appellate Procedure**

Rule 4(d) is hereby amended to read as follows:

(d) To Which Appellate Court Addressed. An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced ~~to life imprisonment or~~ death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals.

Adopted by the Court in Conference this 2nd day of October 1997. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (<http://www.aoc.state.nc.us>).

Orr, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.

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ANIMALS, LIVESTOCK, OR POULTRY	INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS
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TAXATION	
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ABATEMENT, SURVIVAL, AND REVIVAL OF ACTIONS**§ 14 (NCI4th). Actions arising out of miscellaneous circumstances**

The trial court did not err by denying defendant's plea in abatement in an action in which Onslow County sought to hold the owners of adult entertainment establishments liable for violating the public nuisance laws while prior state and federal actions were pending. **State ex rel. Onslow County v. Mercer**, 371.

ADMINISTRATIVE LAW AND PROCEDURE**§ 9 (NCI4th). Office of Administrative Hearings**

The Office of Administrative Hearings had jurisdiction to hear an ESC employee's claim for retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964. **Employment Security Comm. v. Peace**, 1.

§ 44 (NCI4th). Final decisions or orders

A county DSS was required to state the specific reasons why it did not adopt the recommended decision of the State Personnel Commission to reinstate petitioner and to serve a copy of its final decision on the petitioner, but it was not obligated to enter findings of fact and conclusions of law. **Cunningham v. Catawba County**, 70.

ADOPTION OR PLACEMENT FOR ADOPTION**§ 30 (NCI4th). Illegitimacy of child; putative father's right to consent to adoption**

The statute requiring the putative father of an illegitimate child to do one of the acts specified in the statute in order to establish a right to the requirement of his consent to adoption of the child does not discriminate against similarly situated individuals on the basis of gender, and the constitutionality of the statute under the Equal Protection Clause should be decided under the standard of whether the distinction between the mother and putative father is rationally related to the achievement of a legitimate state interest. **In re Dockery**, 631.

The statute requiring the putative father of an illegitimate child to do one of the acts specified in the statute in order to establish a right to the requirement of his consent to adoption of the child does not violate the putative father's equal protection or substantive due process rights. **Ibid.**

ANIMALS, LIVESTOCK, OR POULTRY**§ 8 (NCI4th). Injuries caused by dogs**

The trial court erred by granting summary judgment for defendant in a negligence action which resulted from defendant's dog charging at plaintiff while plaintiff rode her bicycle. Presenting evidence that defendant had no knowledge that the dog had chased bicyclists in the past does not satisfy his burden of showing that plaintiff cannot present evidence that he was aware or should have been aware that his dog was likely to chase bicyclists; whether a dog is likely to chase a bicyclist requires consideration of various factors. **Kennedy v. Hawley**, 312.

APPEAL AND ERROR**§ 64 (NCI4th). Who may appeal; party or privity to action, generally**

A nonparty to an action may not appeal from the judgment of the trial court. **Watson v. Ben Griffin Realty and Auction**, 61.

APPEAL AND ERROR—Continued**§ 77 (NCI4th). Appeal from order reinstating charges**

Trial judges would be well advised to refuse to certify cases pursuant to the statute which permits an interlocutory appeal of a superior court's reversal of a district court's dismissal of criminal charges if defendant or his attorney certifies that the appeal is not taken for delay and the judge finds the cause is appropriately justiciable in the appellate division as an interlocutory matter. **State v. Thompson**, 547.

§ 81 (NCI4th). Appeal by State from superior court

An appeal by the State from the granting of a motion to suppress fifty-two grams of crack in a prosecution for possession and trafficking was dismissed where there was no indication in the record that the prosecutor certified that the appeal was not taken to cause delay and that the suppressed evidence was essential to the State's case. **State v. Judd**, 328.

§ 87 (NCI4th). Appealability of other interlocutory orders in civil actions

Where the jury deadlocked on the issue of defendant's negligence and unanimously found plaintiff not contributorily negligent, and the trial court entered judgment on the verdict that plaintiff was not contributorily negligent and ordered a mistrial on the negligence issue, the judgment was interlocutory and defendant had no right of immediate appeal. **Burchette v. Lynch**, 65.

§ 118 (NCI4th). Summary judgment denied

A highway patrolman's appeal from the denial of his summary judgment motion on a § 1983 claim arising from a traffic stop was immediately appealable because defendant raised the qualified immunity defense. **Rousselo v. Starling**, 439.

§ 122 (NCI4th). Appealability of particular orders; danger of inconsistent verdicts

Plaintiff's appeal of a summary judgment for a highway patrol trooper on claims for false imprisonment and violation of state constitutional rights arising from a traffic stop was immediately appealable because they arose from the same transaction as another claim for which summary judgment was denied. **Rousselo v. Starling**, 439.

§ 155 (NCI4th). Effect of failure to make motion, objection, or request; criminal actions

A second-degree rape defendant being tried as an adult did not properly preserve his argument that the doctrine of judicial estoppel precluded the State from considering a prior adjudication of delinquency as an aggravating factor where the prosecutor at the transfer hearing took the position that the adjudication could not be used but a different prosecutor utilized the adjudication at trial. **State v. Taylor**, 394.

§ 163 (NCI4th). Preserving question for appeal; pleading fails to state essential elements of violation

Defendant's failure to object to submission of felonious restraint to the jury under an indictment for first-degree kidnapping was not an impediment to appeal because defendant challenged the indictment on the grounds that it was on its face insufficient. **State v. Wilson**, 688.

§ 175 (NCI4th). Mootness of other particular questions

Plaintiffs' action seeking a declaratory judgment that a gathering of the mayor and four city council members at one member's home to discuss a proposed sports arena violated the Open Meetings Law and an injunction against future violations was

APPEAL AND ERROR—Continued

not rendered moot by the resolution of another action that sought only prospective relief based upon the same gathering of defendants. **News and Observer Publishing Co. v. Coble**, 307.

§ 177 (NCI4th). Effect of appeal on power of trial court; domestic cases

The trial court lacked jurisdiction to enter judgment on an alimony obligation during pendency of an appeal of a jury determination of adultery. **Lewis v. Lewis**, 183.

§ 341 (NCI4th). Failure to properly assign error

Defendant's contention that a § 1983 claim was improper was not the subject of a proper assignment of error and was not reviewed. **Rousselo v. Starling**, 439.

§ 209 (NCI4th). Appeal in civil actions; content of notice

A notice of appeal from an order denying a motion for a new trial which does not also specifically appeal the underlying judgment does not present the underlying judgment for review. **Fenz v. Davis**, 621.

§ 418 (NCI4th). Assignments of error omitted from brief; abandonment

Plaintiffs' arguments on appeal were considered in the discretion of the Court of Appeals even though the assignments of error were not referenced in the brief. **Perry v. Carolina Builders Corp.**, 143.

Issues raised in plaintiff's brief were not considered where the argument was not the subject of an assignment of error and there was a discrepancy between the assignment of error and the argument. **Wicker v. Holland**, 524.

Defendant waived any consideration of a double jeopardy claim under the North Carolina Constitution by failing to argue this claim in his brief. **State v. Thompson**, 547.

Defendant waived any challenge to the constitutionality of a statute as applied to him where defendant's assignments of error attacked only the facial validity of the statute. *Ibid.*

Questions raised by defendant's assignments of error but not presented in his brief were deemed abandoned. **State v. Creech**, 592.

§ 423 (NCI4th). References in brief to record

An assignment of error which referred to a page of the record that did not support the assignment of error was sufficient because of the limited facts of the case and because the sole assignment of error was specific. **State ex rel. Howes v. Ormond Oil & Gas Co.**, 130.

An assignment of error was addressed in the Court of Appeals' discretion where the appellant argued an issue different from that presented in the assignment of error. *Ibid.*

§ 426 (NCI4th). Brief on appeal; page limitations

The Court of Appeals addressed the general thrust of appellant's argument even though the brief did not comply with rules regarding point type and characters per inch. **Paris v. Woolard**, 416.

§ 443 (NCI4th). Scope of review on appeal generally; review on assignments of error and record

The denial of defendants' motions to dismiss was not before the appellate court where defendants failed to specify their intent to appeal that part of the trial court's order in their notices of appeal. **Tohato, Inc. v. Pinewild Management, Inc.**, 386.

APPEAL AND ERROR—Continued**§ 447 (NCI4th). Issues first raised on appeal**

The Court of Appeals did not consider the Department of Transportation's argument that a statute was unconstitutional where the record does not affirmatively show that the question was raised and passed upon in the trial court. **U.S. Fidelity and Guaranty Co. v. Johnson**, 520.

ARBITRATION AND AWARD**§ 14 (NCI4th). Action to compel arbitration**

A party to a contract who seeks to compel arbitration under Texas law must first establish his right to that remedy under the contract. **Tohato, Inc. v. Pinewild Management, Inc.**, 386.

§ 24 (NCI4th). Disputes arising under partnership agreements

A limited partner's derivative action seeking to terminate service contracts entered on behalf of the limited partnership did not come within the arbitration clause in the limited partnership agreement. **Tohato, Inc. v. Pinewild Management, Inc.**, 386.

§ 42 (NCI4th). Modification or correction of award

The trial court did not err by denying plaintiff's motion to modify an arbitration award arising from a dispute involving seven contracts between a contractor and a masonry subcontractor where the arbitrators entered a single award and plaintiff moved to vacate or modify the award to show seven separate awards. **Trafalgar House Construction v. MSL Enterprises, Inc.**, 252.

The trial court did not err in a dispute between a contractor and a masonry subcontractor by not vacating or setting aside an arbitration award based on allegations that it was procured by fraud or misconduct where no nexus was established between the fraud and the award. **Ibid.**

ARREST AND BAIL**§ 143 (NCI4th). Pretrial release; defendants charged with crimes of domestic violence**

The statute permitting pretrial detention without bond for up to forty-eight hours for crimes of domestic violence is regulatory, not punitive, and does not constitute punishment for purposes of double jeopardy. **State v. Thompson**, 547.

Pretrial detention of defendant for alleged domestic violence without bond for up to forty-eight hours as authorized by G.S. 15A-534.1 did not violate defendant's substantive or procedural due process rights. **Ibid.**

ATTORNEYS AT LAW**§ 46 (NCI4th). Professional malpractice; negligence; proximate cause**

The evidence in a legal malpractice action was sufficient for the jury to find that negligence by defendant attorneys in failing to inform plaintiff purchaser of a lakefront tract and an adjoining lot that a restrictive covenant prevented the lot from being used for access to the lakefront property was a proximate cause of damages resulting from plaintiffs' inability to sell lots in the lakefront tract until the covenant was modified to

ATTORNEYS AT LAW—Continued

allow such access, rather than a grading company's lien on the lakefront tract. **Gram v. Davis**, 484.

§ 49 (NCI4th). Professional malpractice; proof of damages

Plaintiff was properly permitted to introduce on the issue of damages evidence of attorney fees he incurred to remove a restriction on land about which defendant attorneys failed to inform him. **Gram v. Davis**, 484.

AUTOMOBILES AND OTHER VEHICLES**§ 440 (NCI4th). Negligence of owner in permitting incompetent or reckless person to drive**

The trial court did not err in an action arising from an automobile accident by granting summary judgment for a rental car company on the issue of negligent entrustment. **Dwyer v. Margono**, 122.

There was no evidence in a negligence action arising from an automobile accident that a rental company violated the standard of care in the rental car industry by renting an automobile to defendant where, assuming a duty to make an inquiry into the renter's driving background, there is nothing to indicate that an inquiry would have put the company on notice that the renter was an incompetent or reckless driver. **Ibid.**

§ 446 (NCI4th). Respondeat superior; lessees

A rental car company did not breach its duty of reasonable care when it provided a driver with a second rental auto after a parking lot accident and that driver was involved in an accident fatal to plaintiff's decedent after driving extremely fast in hazardous conditions and crossing an interstate median. **Dwyer v. Margono**, 122.

The trial court did not err by granting summary judgment for a rental car company on the agency issue. **Ibid.**

BAILMENT**§ 1 (NCI4th). Nature and requisite of bailment relationships generally**

The lease of cash register equipment was governed by G.S. 25-2A-103. **Coastal Leasing Corp. v. T-Bar Corp.**, 379.

BANKS AND OTHER FINANCIAL INSTITUTIONS**§ 59 (NCI4th). Loans generally**

The trial court properly granted defendants' motion to dismiss a cause of action seeking damages for breach of fiduciary duty by a construction lender where the proceeds were not used as intended. Defendant had no legal duty to insure application of the loan funds to an agreed purpose in the absence of an express contractual provision. **Perry v. Carolina Builders Corp.**, 143.

COLLEGES AND UNIVERSITIES**§ 13 (NCI4th). Student matters related to academics**

A medical resident in a university's family practice program stated a claim against the university for breach of contract where he alleged that the university breached the "Essentials of Accredited Residencies" by its failure to provide him a one-month rotation in gynecology. **Ryan v. U.N.C. Hospitals**, 300.

CONSPIRACY

§ 10 (NCI4th). Civil conspiracy; sufficiency of specific complaints

Plaintiffs stated a claim against defendant employer, defendant workers' compensation insurers, and their agents and employees for civil conspiracy to fraudulently deprive plaintiffs of workers' compensation benefits and medical treatment and to defraud the Industrial Commission. **Johnson v. First Union Corp.**, 450.

CONSTITUTIONAL LAW

§ 85 (NCI4th). Other rights and liberties

The trial court erred in denying defendant's motion for judgment on the pleadings as to a § 1983 claim arising from the dismissal of a police officer where plaintiff failed to allege that he was harmed pursuant to a custom or policy of the City. **Houpe v. City of Statesville**, 334.

§ 86 (NCI4th). State and federal aspects of discrimination

Plaintiff's forecast of evidence was insufficient to support her claims that the exclusion of her property from annexation into defendant city was based upon intentional racial discrimination in violation of the Fourteenth Amendment to the U.S. Constitution pursuant to 42 U.S.C. § 1983 or Article I, § 19 of the N.C. Constitution. **Stephens v. City of Hendersonville**, 156.

§ 94 (NCI4th). Right to equal protection of law; education generally; funding and tuition

The trial court did not err in an action arising from a dispute over the distribution of residual sales tax funds between county and city school systems by concluding that the ad valorem method of distributing residual sales taxes was not unconstitutional under the equal protection clause of the North Carolina Constitution. **Banks v. County of Buncombe**, 214.

§ 98 (NCI4th). State and federal aspects of due process

The trial court properly granted summary judgment for a highway patrol trooper on state constitutional claims for unreasonable detention, search, and seizure arising from a traffic stop and drug search where there were adequate state remedies. **Roussello v. Starling**, 439.

§ 100 (NCI4th). Right to due process of law; determining what process is due

The trial court did not err in an action arising from a dispute over the distribution of residual sales tax funds between county and city school systems by concluding that plaintiffs were not deprived of due process under the North Carolina Constitution. **Banks v. County of Buncombe**, 214.

§ 115 (NCI4th). Right of free speech and press generally

A news reporter did not have a qualified privilege to refuse to testify in a criminal proceeding regarding nonconfidential information obtained from a nonconfidential source. **In re Owens**, 577.

§ 119 (NCI4th). State and federal aspects of religious freedom generally

Claims by former church employees against a church and church organizations for negligent retention and supervision of a minister based upon sexual misconduct by the minister toward the former employees were not barred by the free exercise of religion clause of the First Amendment. **Smith v. Privette**, 490.

CONSTITUTIONAL LAW—Continued**§ 128 (NCI4th). Right to access of courts and legal remedy**

The closure of UNC-CH's Undergraduate Court proceedings did not violate the open courts provision of the North Carolina Constitution or the First Amendment of the United States Constitution. **DTH Publishing Corp. v. UNC-Chapel Hill**, 534.

§ 161 (NCI4th). Rights of persons accused of crime generally

Due process principles were not violated by the consideration of a prior adjudication of delinquency based on rape when sentencing defendant as an adult for another second-degree rape even though the current sentencing law was not in effect at the prior adjudication. **State v. Taylor**, 394.

§ 165 (NCI4th). Ex post facto law; sentencing laws

The trial court did not violate the ex post facto clauses of the state or federal constitutions when sentencing defendant as an adult for second-degree rape by considering his previous adjudication of delinquency based on another second-degree rape in 1993, even though the current statute was not in effect in 1993. **State v. Taylor**, 394.

§ 171.1 (NCI4th). Attachment of jeopardy; effect of voluntary dismissal

Defendant was not subjected to double jeopardy where a former prosecution for sexual offenses was voluntarily dismissed by the State before a jury was empaneled. **State v. Jacobs**, 559.

§ 172 (NCI4th). Attachment of jeopardy; punishment for violation of administrative rule or regulation

The trial court did not err by denying a juvenile's motion to dismiss a summons and petition alleging that she had stolen money belonging to her school based upon double jeopardy where she had been suspended from school for ten days after being found in possession of the money at school. **In re Phillips**, 732.

§ 189 (NCI4th). Former jeopardy; armed robbery and larceny

Defendant's constitutional rights against double jeopardy were not violated by his sentences for both larceny and armed robbery where there were two separate takings. **State v. Jordan**, 469.

§ 219 (NCI4th). Prosecutions under void or defective warrants or indictments generally

A judgment upon a conviction for felonious restraint upon an indictment for first-degree kidnapping which did not allege an essential element of felonious restraint was remanded for judgment and sentencing for false imprisonment, which was supported by the jury verdict. Under double jeopardy, the State could not seek to indict and try defendant again for felonious restraint. **State v. Wilson**, 688.

§ 327 (NCI4th). Speedy trial; what constitutes violation of right; particular circumstances

Defendant scoutmaster's constitutional rights to a speedy trial for sexual offenses were not violated where the acts were committed in the early 1980's, defendant was originally arrested in 1990, those charges were voluntarily dismissed by the State and the record of the charges expunged at defendant's request in 1990, warrants for the current charges were issued in November of 1993, defendant was indicted in June 1994, and his trial commenced in May 1996. **State v. Jacobs**, 559.

CONSTITUTIONAL LAW—Continued**§ 342 (NCI4th). Presence of defendant at proceedings generally**

There was no prejudicial error in a first-degree murder prosecution where the trial court conducted an in-chambers conference with counsel in defendant's absence where defense counsel was instructed to convey the substance of the conference to defendant, the trial court elaborated on the nature of the conference in open court and, given defendant's trial strategy, no harm could be discerned. **State v. Addison**, 741.

§ 352 (NCI4th). Self-incrimination generally

The trial court's order that defendant undergo a third psychiatric evaluation for the purpose of allowing the State to rebut defendant's diminished capacity defense based on evaluations by two defense psychiatrists did not violate defendant's right against self-incrimination and to present a defense. **State v. Clark**, 87.

CONSUMER AND BORROWER PROTECTION**§ 53 (NCI4th). Representations as to winners of prizes and contests**

Plaintiff's allegations were sufficient to state a claim for breach of contract arising from a promotional campaign with a Ford pick-up truck as the contest grand prize where plaintiff alleged that he had entered the contest by submitting an entry form in exchange for an opportunity to have it drawn as the winning ticket, his name was drawn and he was notified that he had won the prize, and he never received the truck nor anything else. **Jones v. Capitol Broadcasting Co.**, 271.

Plaintiff's allegations were sufficient to state a claim for violation of G.S. 75-32 arising from a promotional campaign involving a Ford pick-up truck as grand prize. **Ibid.**

CONTEMPT OF COURT**§ 17 (NCI4th). Criminal contempt; notice and opportunity to respond**

The trial court complied with the requirements of G.S. 5A-14 in imposing criminal contempt sanctions against a news reporter without notice and a formal hearing after she clearly asserted the privilege argument, the court rejected the argument and instructed the reporter to answer the prosecutor's questions about an interview with an attorney of a murder suspect, and the reporter refused to answer the prosecutor's questions. **In re Owens**, 577.

CONTRACTS**§ 148 (NCI4th). Sufficiency of evidence; miscellaneous contracts**

The trial court did not err in denying defendants' motion for a directed verdict at the close of all evidence on a breach of contract claim arising from the sale of a lot in a subdivision where there was evidence that the lot was smaller than first represented. **Edwards v. West**, 570.

COSTS**§ 10 (NCI4th). Allowance of costs in court's discretion**

Defendant failed to demonstrate that the trial court exceeded its discretionary authority in awarding costs in a medical malpractice action. **Brown v. Flowe**, 668.

COUNTIES**§ 91 (NCI4th). Police power; particular activities; miscellaneous**

A county ordinance making it "unlawful for any person to own, keep, or have in the county an animal that habitually or repeatedly makes excessive noises that tend to annoy, disturb, or frighten its citizens" is not unconstitutionally vague, and the jury's verdict finding defendant guilty of violating the ordinance based on the barking of his hound dogs was not arbitrary or subjective. **State v. Taylor**, 616.

COURTS**§ 19 (NCI4th). Stay of proceeding to permit trial in foreign jurisdiction**

In an action to determine insurance coverage for environmental contamination claims at ninety-four sites in twenty states, the trial court did not abuse its discretion by entering an order staying further litigation in North Carolina concerning sites located outside this state and allowing the parties to file suits in other states concerning sites located in those states after the court entered partial summary judgment declaring that the policies in question did not provide coverage for claims arising from certain North Carolina sites. **Home Indemnity Co. v. Hoechst Celanese Corp.**, 113.

§ 74 (NCI4th). Superior court jurisdiction to review rulings of another superior court judge generally

In an action to determine insurance coverage for environmental contamination claims at ninety-four sites in twenty states, the entry of partial summary judgment effectively ending controversies as to all North Carolina sites and plaintiffs' motion to amend the complaint to add 142 additional sites and claims constituted changed conditions which permitted the trial judge to overrule another superior court judge's order lifting an earlier stay by entering another order staying further litigation in North Carolina concerning sites located in other states. **Home Indemnity Co. v. Hoechst Celanese Corp.**, 113.

§ 84 (NCI4th). Superior court jurisdiction to review rulings of another superior court judge; motion for summary judgment

In an action to recover for injuries received by the minor plaintiff while playing on a gate constructed by defendant on school grounds, a superior court judge's denial of defendant's motion for summary judgment precluded a second judge from thereafter entering summary judgment in favor of defendant where the legal issues remained the same. **Hastings v. Seegars Fence Co.**, 166.

§ 111 (NCI4th). Reporting of civil trials

A hearing on defendant's motion to set aside a domestic consent order was a trial within the meaning of G.S. 7A-198(a) and the trial court erred by not recording those proceedings, but there was no prejudice because the record includes both parties' versions of the proceedings. **Coppley v. Coppley**, 658.

CRIME AGAINST NATURE**§ 10 (NCI4th). Sufficiency of evidence generally**

The trial court did not err in a prosecution for indecent liberties by denying defendant's motion to dismiss for lack of evidence of the sexual element of the crime. **State v. Creech**, 592.

CRIMINAL LAW**§ 18 (NCI4th Rev.). Defenses; mental capacity; burden of proof**

The trial court's order that defendant undergo a third psychiatric evaluation for the purpose of allowing the State to rebut defendant's diminished capacity defense based on evaluations by two defense psychiatrists did not violate defendant's rights against self-incrimination and to present a defense. **State v. Clark**, 87.

§ 103 (NCI4th Rev.). Discovery proceedings; defendant's statement

A witness was not permitted to testify in violation of the discovery statute where the State disclosed a statement made by defendant offering to pay the witness if he would plead guilty to robberies for which defendant was charged, and additional testimony by the witness that defendant admitted he wore a hat or bandanna and carried a gun during the robberies simply supported the statements disclosed in discovery. **State v. Caporasso**, 236.

§ 111 (NCI4th Rev.). Discovery proceedings; information subject to disclosure by State; other information

The trial court did not err in a prosecution for assault and robbery by denying defendant's motion to compel discovery where defendant contended that the State had failed to provide him with a second photographic lineup. **State v. Johnson**, 469.

The trial court did not err in a prosecution for robbery and assault by denying defendant's motion to compel the State to produce materials favorable to the defense where the State failed to provide before trial information regarding the victim's conviction of assault on a female and incarceration for a probation violation. **Ibid.**

§ 114 (NCI4th Rev.). Discovery proceedings; information subject to disclosure by defendant; documents and tangible objects

The trial court's order that the Department of Correction provide to the State copies of defendant's probation and parole records which were provided to defendant was not made under G.S. 15A-905(a) and thus did not violate that statute because the records were not in the "possession, custody, or control of the State" within the meaning of G.S. 15A-903(d). **State v. Clark**, 87.

§ 115 (NCI4th Rev.). Discovery proceedings; information subject to disclosure by defendant; reports of examinations and tests

The trial court erred by ordering defendant's psychiatric experts to prepare and deliver to the State written reports of their evaluations of defendant, but this order did not violate defendant's constitutional rights to be free from compulsory self-incrimination and to present a defense and was not prejudicial to defendant. **State v. Clark**, 87.

§ 120 (NCI4th Rev.). Regulation of discovery; failure to comply

The trial court did not err in a prosecution for taking indecent liberties with children by admitting testimony which defendant contended was not revealed during discovery. **State v. Creech**, 592.

§ 143 (NCI4th Rev.). Plea of guilty; requirement of voluntary and understanding plea generally

Defendant's 1973 guilty plea was not obtained in violation of *Boykin v. Alabama*, 395 U.S. 238, because the court that accepted the plea failed to inform defendant of his constitutional right to trial by jury, his right to confront his accusers, and his privilege against self-incrimination. **State v. Dammons**, 16.

CRIMINAL LAW—Continued**§ 264 (NCI4th Rev.). Continuance; absence or change of appointed counsel generally**

The trial court did not err in denying defendant's motion for a continuance after he discharged his attorney and was granted the right to proceed pro se where defendant asked for "two hours or something" to prepare for trial and defendant had one and one-half hours during the lunch recess and an overnight recess to prepare his case. **State v. Jackson**, 626.

§ 357 (NCI4th Rev.). Prisoner not to be tried in prison uniform

The trial court did not err in a prosecution for robbery and assault by denying defendant's motion to strike the venire on the grounds that members saw defendant wearing an identification wristband required by the county jail. **State v. Johnson**, 469.

§ 381 (NCI4th Rev.). Conduct and duties of judge; miscellaneous comments and actions

There was a prejudicial abuse of discretion requiring a remand in a stalking prosecution where defendant was not represented by counsel, requested an extension of time, the trial judge nodded, and, when subsequently asked to rule on the motions for which the extension had been granted, noted that he had intended by his nod only to grant the normal ten to twenty days. Failure to give a definite date coupled with the later refusal to hear the motions was prejudicial because it appears that one of the motions would have led to a change of venue. **State v. Ferebee**, 710.

§ 413 (NCI4th Rev.). Denial of motion for recess

The trial court did not err by allowing a witness to testify about threats made by defendant without granting defendant's motion for a recess to investigate this allegation and to question bailiffs who purportedly witnessed defendant making the threats. **State v. Caporasso**, 236.

§ 418 (NCI4th Rev.). Argument of counsel; opening statements

The trial court in a first-degree murder case did not err by precluding defense counsel from forecasting during his opening statements evidence that the victim, defendant's wife, had a prior criminal record, used cocaine, had extra-marital affairs, and had a baby by another man because this evidence was not relevant to defendant's defense of diminished capacity or to any theory of defendant's case. **State v. Clark**, 87.

§ 431 (NCI4th Rev.). Argument of counsel; failure to call particular witnesses or offer particular evidence

The prosecutor's closing argument in a first-degree murder trial about the failure of defendant's first psychiatrist to testify, including statements that defendant may have had to get a new psychiatrist because defendant told the first psychiatrist a different version of the killings than defendant told in court, merely raised an inference as to why one of defendant's witnesses had not testified and was not improper. **State v. Clark**, 87.

§ 433 (NCI4th Rev.). Argument of counsel; defendant's failure to testify; comment by prosecution

The prosecutor's argument in a murder trial that "In order to have self-defense, you got to get on the witness stand and you got to admit that you" constituted an improper comment on defendant's failure to testify. **State v. Riley**, 265.

CRIMINAL LAW—Continued**§ 444 (NCI4th Rev.). Argument of counsel; miscellaneous comments on defendant's general character and truthfulness**

There was no abuse of discretion prejudicial to defendant in a manslaughter prosecution where the trial court did not intervene when the prosecution argued that defendant's own attorney doubted defendant's credibility. **State v. Shope**, 611.

§ 467 (NCI4th Rev.). Argument of counsel; permissible inferences

The prosecutor's argument about the length of time it took to try defendant for first-degree murder amounted to an observation on the time it may have taken defendant to "think up" a defense and was a reasonable inference based on the evidence. **State v. Clark**, 87.

§ 504 (NCI4th Rev.). Deliberations; use of evidence by the jury

The trial court did not abuse its discretion by allowing the jury to view a finger-print card in open court after it began its deliberations despite objections by the prosecutor and the defendant. **State v. Lee**, 506.

§ 560 (NCI4th Rev.). Circumstances in which mistrial may be ordered; miscellaneous other circumstances or conduct

The trial court did not abuse its discretion in declaring a mistrial in a DWI prosecution based upon findings that several jurors were unable to return to the courthouse for the second day of trial because of snow and that defendant's attorney had informed the court that it would be difficult for him to get to court. **State v. Shoff**, 432.

§ 669 (NCI4th Rev.). Expunction of records after dismissal; records of court and law enforcement agencies

Defendant-scoutmaster's rights to due process were not violated by the district attorney retaining investigative records where the record of charges for sexual offenses was expunged at defendant's request and the district attorney's office retained investigative materials. **State v. Jacobs**, 611.

§ 741 (NCI4th Rev.). Opinion of court on evidence; framing of instructions generally

There was no plain error in a prosecution for first-degree sexual offenses and taking indecent liberties where the court referred to the prosecuting witness as a victim during the jury charge. **State v. Hatfield**, 294.

§ 828 (NCI4th Rev.). Instructions on witness credibility; corroborative evidence

In a stalking prosecution remanded on other grounds, the trial court erred by not giving a requested instruction on corroboration where two witnesses had testified about prior statements made by the victim. **State v. Ferebee**, 710.

§ 837 (NCI4th Rev.). Instructions on witness credibility; sex crime victim

The trial court did not commit plain error in the prosecution of a scoutmaster for sexual offenses by using "victims" when referring to the complainants. **State v. Jacobs**, 559.

§ 925 (NCI4th Rev.). Manner of polling the jury

The jury returned a unanimous verdict, even though the clerk of court did not state the full verdict of "guilty of assault with a deadly weapon inflicting injury" when polling the individual jurors but just stated "guilty of assault with a deadly weapon,"

CRIMINAL LAW—Continued

where only one crime was submitted to the jury and the clerk correctly stated the charge when originally asking the foreperson about the verdict. **State v. Dammons**, 16.

§ 1093 (NCI4th Rev.). Structured Sentencing Act; prior record level

The trial court did not err when sentencing defendant for assault with a deadly weapon inflicting serious injury in its determination of prior record points where defendant had appealed a district court conviction to superior court and then withdrawn the appeal, so that the matter was remanded to district court at an unknown date, defendant was also sentenced in district court for other crimes, and the superior court treated the remanded conviction separately from other convictions and awarded an extra point even though defendant argued that the convictions occurred at the same session of district court. **State v. Wilkins**, 315.

§ 1309 (NCI4th Rev.). Definition of habitual felon and violent habitual felon

A final judgment entered pursuant to a no contest plea constitutes a conviction for purposes of the habitual felon statute. **State v. Jackson**, 626.

§ 1313 (NCI4th Rev.). Repeat or habitual offender; evidence of prior convictions of felony offenses

Defendant could not collaterally attack the validity of an underlying conviction that supported an habitual felon charge. **State v. Dammons**, 16.

DAMAGES**§ 59 (NCI4th). Liquidated damages generally**

The trial court did not err by granting summary judgment for plaintiffs on the issue of enforcing a liquidated damages clause in a cash register lease. **Coastal Leasing Corp. v. T-Bar Corp.**, 379.

DECLARATORY JUDGMENT ACTIONS**§ 7 (NCI4th). Requirement of actual justiciable controversy**

The trial court lacked jurisdiction under the Declaratory Judgment Act to enter a judgment in an action to determine whether an agreement giving defendant the exclusive right to provide water to certain land was enforceable because the alleged controversy was based solely on a proposed water system. **Town of Pine Knoll Shores v. Carolina Water Service**, 321.

DIVORCE AND SEPARATION**§ 8 (NCI4th). Separation agreements; grounds for attacking agreements; fraud**

The trial court correctly dismissed defendant's counterclaims in a divorce action where defendant alleged fraud and breach of contract in that plaintiff had falsely represented in the separation agreement that he had fully disclosed all marital assets. The duty to disclose is governed by the agreement when the parties are not in a confidential relationship, and this agreement required a full and accurate disclosure only with respect to the information requested. **Daughtry v. Daughtry**, 737.

DIVORCE AND SEPARATION—Continued**§ 10 (NCI4th). Separation agreements; coercion or duress**

The trial court abused its discretion in denying defendant's motion to set aside a domestic consent order where it was clear that defendant was in a vulnerable position and at the mercy of plaintiff and that defendant was thereby robbed of taking action of her own free will, preventing the giving of true consent. **Coppley v. Coppley**, 658.

§ 161 (NCI4th). Distribution factors; application of factors in particular cases

The trial court did not err in an equitable distribution action by distributing the value of a note unequally rather than imposing a constructive trust. **Upchurch v. Upchurch**, 461.

§ 200 (NCI4th). Alimony; when award may be made

In an absolute divorce action where defendant wife counterclaimed for alimony on the grounds of indignities, the trial court improperly found that plaintiff husband had a heightened duty to recognize the difficulties in the marriage and that his failure to fulfill this duty constituted indignities toward defendant. **Vann v. Vann**, 516.

§ 261 (NCI4th). Alimony; abandonment; sufficiency of evidence

The trial court did not err by finding that plaintiff wife abandoned defendant husband when she left her family and stayed in Hawaii for two months and the parties never resumed cohabitation. **Hanley v. Hanley**, 54.

§ 269 (NCI4th). Grounds for alimony; conduct of dependent spouse

The trial court did not use the wife's marital misconduct (abandonment of the husband) as the sole basis for denying the wife alimony but properly considered the economic factors set forth in G.S. 50-16.3A. **Hanley v. Hanley**, 54.

§ 359 (NCI4th). Modification of custody order generally

An order modifying a child custody order was vacated where the findings were indicative of defendant's fitness as a parent but revealed nothing about the impact of lifestyle changes upon the minor children. **Wiggs v. Wiggs**, 512.

§ 402 (NCI4th). Parents' ability to support child; sufficiency of findings

A child support order was remanded where it could not be determined whether the court chose to find a business loss not credible or whether defendant's income was \$77,000 with the loss. **Burnett v. Wheeler**, 174.

§ 405 (NCI4th). Parents' ability to support child; sufficiency of evidence to support finding or order

The trial court did not abuse its discretion in a child support matter in its calculation of defendant's income where the court found defendant's total income from all available sources along with defendant's earning capacity. **Burnett v. Wheeler**, 174.

§ 431 (NCI4th). Modification of support order; findings required

An order modifying defendant's child support obligation was not supported by sufficient findings of fact of changed circumstances where the court found that plaintiff was earning more and defendant less, and that plaintiff could provide medical insurance less expensively, but made no findings regarding any changes in the needs of the minor children. **Wiggs v. Wiggs**, 512.

DIVORCE AND SEPARATION—Continued**§ 565 (NCI4th). Uniform Reciprocal Enforcement of Support Act generally**

The trial court erred by modifying a Texas child support order where one party remained in Texas and there was nothing in the record to show that consent had been given for North Carolina to assume jurisdiction. **Hinton v. Hinton**, 637.

The trial court's modification of a Texas support order violated 28 USCA § 1738B where one party remained in Texas and there was no consent in writing from all parties. **Ibid.**

EASEMENTS**§ 9 (NCI4th). Creation of easements generally**

Summary judgment was properly granted for defendants in an action for an injunction arising from a proposed fence on the issue of whether an express easement existed in plaintiffs' favor and whether plaintiffs were entitled to specific performance. The standard language regarding "all privileges and appurtenances thereto belonging" found in most warranty deeds does not by itself serve as a recording of an agreement to convey an easement or right of way. **Tedder v. Alford**, 27.

§ 23 (NCI4th). Implication from prior use; necessity of use

The trial court did not err in an action for an injunction arising from a proposed fence by granting a directed verdict for defendants on the issue of whether an easement by implication existed where there was no evidence upon which a reasonable jury could have concluded that there was any "prior use." **Tedder v. Alford**, 27.

§ 27 (NCI4th). Ways of necessity; necessity of use

The trial court did not err in an action arising from a proposed fence by granting a directed verdict on the issue of easement by necessity where plaintiffs' need to use the property did not arise until after the tract had been deeded to them and after they had constructed an addition to their building. **Tedder v. Alford**, 27.

EVIDENCE AND WITNESSES**§ 213 (NCI4th). Events prior to crime**

In a stalking prosecution remanded on other grounds, the trial court did not abuse its discretion by admitting evidence relating to events which occurred before defendant was warned to stay away from the victim; the evidence was relevant to enlighten the jury to the background between the defendant and the victim and to allow the jury to place into context the reason defendant was warned to stay away. **State v. Ferebee**, 710.

§ 264 (NCI4th). Character or reputation of persons other than witness; victim

Evidence about an incident in which his wife shot defendant was irrelevant in a prosecution of defendant for the first-degree murder of his wife and her boyfriend where defendant did not claim self-defense. **State v. Clark**, 87.

§ 344 (NCI4th). Other crimes, wrongs, or acts; to show intent; assault offenses

The State's cross-examination of defendant in an aggravated assault trial about the names of other women he had been convicted of shooting, his relationship with those other women, and the type of weapons he had used was proper under Rule

EVIDENCE AND WITNESSES—Continued

404(b) to show that defendant had a history of shooting women with whom he had previously had relationships. **State v. Dammons**, 16.

§ 374 (NCI4th). Other crimes, wrongs, or acts admitted to show common plan, scheme, or design; involving other's children

The trial court did not err in a prosecution for indecent liberties by admitting testimony of incidents following the same pattern as with the two victims in this case. **State v. Creech**, 592.

§ 402 (NCI4th). Identification evidence; opportunity to observe defendant during commission of offense

Three witnesses were properly permitted to make in-court identifications of defendant based upon their observations of defendant without being first required to submit to other non-suggestive identification procedures. **State v. Caporasso**, 236.

§ 609 (NCI4th). Surrebuttal

The trial court did not improperly deny defendant the right to present surrebuttal evidence by the denial of defendant's request for additional funds to bring his "blood spatter" expert witness back to court to rebut testimony by the State's rebuttal expert witness where the State's witness presented no new or additional evidence regarding the State's version of the crime. **State v. Clark**, 87.

§ 876 (NCI4th). Hearsay; to show state of mind of victim

The trial court did not err in a first-degree murder and assault prosecution by admitting statements made by the victim to her sister that she was afraid of defendant. **State v. Exum**, 647.

§ 929 (NCI4th). Excited utterances generally

The applicability of the excited utterance exception to the hearsay rule does not depend on the declarant actually testifying in the trial in which the excited utterance is offered. **State v. Riley**, 265.

§ 930 (NCI4th). Excited utterances; amount of time elapsed between statement and event as affecting admissibility

The trial court did not err by allowing defendant's sister-in-law to testify about statements made about defendant by his now deceased mother where the statements were close enough in time to her perception of defendant's statements for the present sense impression exception to apply. **State v. Clark**, 722.

§ 945 (NCI4th). Excited utterances; statements made at time crime was occurring

A murder defendant's statement made while he was wrestling with the victim that he wasn't going to let the victim go because the victim had a gun was admissible under the excited utterance exception to the hearsay rule. **State v. Riley**, 265.

§ 1229 (NCI4th). Confessions and other inculpatory statements; statement made to person other than police officer

The trial court did not err by denying a juvenile's motion to suppress inculpatory statements and the fruits thereof obtained during questioning by an assistant principal about money stolen from the school. **In re Phillips**, 732.

EVIDENCE AND WITNESSES—Continued**§ 1246 (NCI4th). Warnings as to rights; where defendant is a juvenile**

The trial court did not err in a second-degree rape prosecution of a juvenile as an adult by admitting defendant's confession. While other states require that the State establish that a juvenile was advised of the possibility of being tried as an adult, no such requirement has been established in North Carolina. **State v. Taylor**, 394.

§ 1255 (NCI4th). Confessions and other inculpatory statements; invocation of right to counsel; post-invocation communication initiated by defendant

Defendant's constitutional right to silence was not violated by police officers where defendant invoked his right to counsel but then initiated further conversation with the police officers and made a waiver of his previously asserted right to counsel. **State v. Jordan**, 469.

§ 1263 (NCI4th). Confessions and other inculpatory statements; waiver of constitutional rights; express waiver not required

The trial court did not err in the prosecution of a juvenile as an adult for armed robbery and assault by denying defendant's motion to suppress his confession where defendant argued that he never expressly waived his rights. **State v. Flowers**, 697.

§ 1276 (NCI4th). Confessions and other inculpatory statements; waiver of constitutional rights; age of defendant

The trial court did not err in the prosecution of a juvenile as an adult by denying his motion to suppress his confession; interrogating officers need not explain the Miranda rights in greater detail than required by Miranda even when the suspect is a minor, nor must they explain juvenile rights in greater detail than required by statute. **State v. Flowers**, 697.

The trial court correctly concluded that a juvenile defendant being tried as an adult understood his Miranda rights and knowingly, intelligently, and voluntarily waived those rights. **Ibid.**

§ 1331 (NCI4th). Confessions and other inculpatory statements; juvenile defendant

The trial court did not err in the prosecution of a juvenile as an adult for robbery and assault by denying defendant's motion to suppress his confession where the evidence supported the conclusion that a warning was read to defendant before he was questioned. **State v. Flowers**, 697.

§ 1523 (NCI4th). Admission of sexually explicit magazines; rape and related offenses

The trial court did not err in a prosecution for taking indecent liberties with children in admitting photographs of male models and men in bikini underwear or g-strings where defendant admitted at trial that he had had homosexual encounters with men, other witnesses referred to defendant's homosexuality before the photographs were introduced, and the photographs corroborated the testimony of other witnesses. **State v. Creech**, 592.

§ 1617 (NCI4th). Audio tape recordings generally

The trial court did not abuse its discretion by admitting into evidence a tape recording of a 911 call from a robbery victim's children where the court weighed the potential prejudice against its probative value. **State v. Jordan**, 469.

EVIDENCE AND WITNESSES—Continued**§ 1723 (NCI4th). Video tapes generally**

Plaintiff did not show abuse of discretion or prejudice in a negligence action arising from a three-story fall at a construction site in the admission of a videotape of the building. **Sloan v. Miller Building Corp.**, 37.

§ 1865 (NCI4th). Fingerprints; at scene of crime

There was sufficient evidence for the jury to conclude that defendant's fingerprints were impressed on a greeting card while committing a crime at the victim's residence. **State v. Lee**, 506.

§ 1906 (NCI4th). Photographic lineups

The trial court did not err in a robbery and assault prosecution by denying defendant's motion to suppress an out-of-court photographic identification where the individuals in the lineup all possessed physical characteristics similar to defendant's and, while defendant's photograph was one of two or three that were darker than the others, there is nothing to indicate that defendant's complexion was considered in constructing the lineup. **State v. Johnson**, 361.

§ 2282 (NCI4th). Opinion testimony by experts; consequences of injury, disease, or condition

A surgeon's testimony as to the permanency of the minor plaintiff's injuries from a femur fracture was not too speculative to be admitted into evidence where the testimony set forth "probable" and not "possible" consequences. **Pruitt v. Powers**, 585.

§ 2302 (NCI4th). Assessment of mental health or state of mind; specific intent; malice; premeditation

The trial court in a first-degree murder case did not err by precluding defense counsel from forecasting during his opening statements evidence that the victim, defendant's wife, had a prior criminal record, used cocaine, had extra-marital affairs, and had a baby by another man because this evidence was not relevant to defendant's defense of diminished capacity or to any theory of defendant's case. **State v. Clark**, 87.

§ 2415 (NCI4th). Material witness order generally

The trial court did not abuse its discretion in the prosecution of a scoutmaster for sexual offenses by denying defendant's motion that a former scout then serving in the U.S. Army in Korea be declared a material witness. **State v. Jacobs**, 559.

§ 2485 (NCI4th). Exclusion or sequestration of witnesses; violation of sequestration order generally

The trial court did not abuse its discretion by denying defendant's motion to preclude further testimony from witnesses in a prosecution for assault and robbery where the court had issued a sequestration order and two witnesses spoke with each other outside of court after one had testified and the other had given her statement to an officer. **State v. Johnson**, 361.

§ 2604 (NCI4th). Privileged communications generally

A news reporter did not have a qualified privilege to refuse to testify in a criminal proceeding regarding nonconfidential information obtained from a nonconfidential source. **In re Owens**, 577.

EVIDENCE AND WITNESSES—Continued**§ 2967 (NCI4th). Impeachment; bias, prejudice, interest, or motive; hostile feelings or actions**

The trial court did not err in a prosecution for first-degree murder by excluding testimony regarding statements by two State's witnesses which would show their bias. *State v. Clark*, 722.

§ 2983 (NCI4th). Basis for impeachment; conviction of crime generally

The trial court did not err in a prosecution for robbery and assault by denying defendant's motion to question the victim regarding his prior drug arrest. *State v. Johnson*, 361.

§ 3030 (NCI4th). Impeachment; specific instances of conduct; discretion of court

The trial court did not err in a prosecution for possession of a firearm by a felon by admitting evidence of previous convictions for assault with a deadly weapon and voluntary manslaughter. *State v. Faison*, 745.

FALSE IMPRISONMENT**§ 4 (NCI4th). Duration of restraint**

The trial court did not err by granting summary judgment for defendant-highway patrol trooper on a claim for false imprisonment arising from a traffic stop and drug search where the trooper did not illegally restrain plaintiff. *Roussello v. Starling*, 439.

FRAUD, DECEIT, AND MISREPRESENTATION**§ 28 (NCI4th). Detrimental reliance**

A claim for fraudulent misrepresentation against a construction lender by a subordinate lienholder involving funds which were not applied as intended was properly dismissed where there was no allegation of reasonable reliance. *Perry v. Carolina Builders Corp.*, 143.

HIGHWAYS, STREETS, AND ROADS**§ 15 (NCI4th). Neighborhood roads generally**

Even if a roadway on plaintiffs' land formerly used by the public for ingress and egress constituted a neighborhood public road, defendants had no right to place a sewer line serving their residence under this roadway. *Moore v. Leveris*, 276.

§ 31 (NCI4th). Outdoor advertising generally

The trial court did not err by determining that DOT's method of defining interstate right-of-way based solely on dates of construction was arbitrary where the sign was within DOT's jurisdiction if right-of-way was measured from the interchange ramp but not if measured from the highway, and DOT contended that the interchange was built as part of the intersecting highway after construction of the interstate and cannot be considered part of the interstate system. *Whiteheart v. Garrett*, 78.

§ 55 (NCI4th). Municipalities; extent of duty to maintain

Since the intersection of a State highway and a city street is part of the State highway system, failure of the city to install traffic control devices or lower the speed limit at the intersection could not render the city liable for the death of a student who was

HIGHWAYS, STREETS, AND ROADS—Continued

struck by a vehicle while crossing the State highway at this intersection. **Estate of Jiggetts v. City of Gastonia**, 410.

Safety measures taken by a city after a student was struck by a vehicle at an intersection that was part of the State highway system, including lowering the speed limit, painting crosswalks, and installing pedestrian push buttons, did not demonstrate the city's control over the intersection so as to render it liable for the student's death. **Ibid.**

The estate of a student struck by a vehicle at an intersection in defendant city that was a part of the State highway system failed to forecast evidence of a claim as a third-party beneficiary of a purported contract between the city and the NCDOT for the city to maintain the intersection. **Ibid.**

HOMICIDE**§ 75 (NCI4th). Self-defense generally**

The Court of Appeals noted that a charge on self-defense in a prosecution for first-degree murder would be inappropriate under the circumstances. **State v. Addison**, 741.

§ 760 (NCI4th). Manslaughter; aggravating and mitigating factors

The trial court did not err in a manslaughter prosecution by rejecting defendant's claim that his relationship with the victim constituted an extenuating circumstance warranting mitigation where he killed the victim moments after finding her in the arms of another man. **State v. Shope**, 611.

The trial court properly found as an aggravating factor when sentencing defendant for manslaughter that the killing of the victim was especially heinous, atrocious, or cruel. **Ibid.**

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS**§ 61 (NCI4th). Commitment of substance abusers**

The trial court exceeded its authority when it ordered Dorothea Dix to provide substance abuse treatment for petitioner where the order was not conditioned on petitioner's continued qualification as a substance abuser who was dangerous to himself or others. **In re Royal**, 645.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS**§ 3 (NCI4th). Waiver of indictment**

Defendant did not waive his right to challenge the sufficiency of an indictment for first-degree kidnapping to support a conviction for felonious restraint by requesting the instruction on felonious restraint. **State v. Wilson**, 688.

§ 18 (NCI4th). Necessity that every matter required to be proved at trial be alleged

A first-degree kidnapping indictment which did not allege that defendant transported the victim by motor vehicle or other conveyance was insufficient to support a charge of felonious restraint. **State v. Wilson**, 688.

§ 29 (NCI4th). Sufficiency of particular allegations; time

The trial court did not err in a prosecution for first-degree sexual offenses and taking indecent liberties by denying defendant's motion to dismiss the indictments as impermissibly vague about the dates of the offenses. **State v. Hatfield**, 294.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS—Continued**§ 43 (NCI4th). Discretionary denial of motion for bill of particulars**

The trial court did not abuse its discretion in the prosecution of a scoutmaster for sexual offenses by denying defendant's motion for a bill of particulars. **State v. Jacobs**, 559.

INDIGENT PERSONS**§ 18 (NCI4th). Waiver of right to counsel; setting aside or withdrawal of waiver**

A defendant who discharged his counsel and was granted the right to proceed pro se failed to show good cause for the reappointment of counsel to represent him on an habitual felon charge after the jury returned a verdict on the underlying substantive offenses. **State v. Jackson**, 626.

§ 24 (NCI4th). Supporting services; other expert witnesses

The trial court did not improperly deny defendant the right to present surrebuttal evidence by the denial of defendant's request for additional funds to bring his "blood spatter" expert witness back to court to rebut testimony by the State's rebuttal expert witness where the State's witness presented no new or additional evidence regarding the State's version of the crime. **State v. Clark**, 87.

INFANTS OR MINORS**§ 99 (NCI4th). Transfer to superior court for trial as adult generally**

The juvenile transfer statute is not unconstitutionally vague. **State v. Taylor**, 394.

§ 148 (NCI4th). Day-care facilities

Plaintiff's evidence was sufficient for the jury on the issue of negligence by defendant day care operators in an action to recover damages for a fractured leg suffered by a three-year-old student when he was pushed by other boys in the class. **Pruitt v. Powers**, 585.

INJUNCTIONS**§ 43 (NCI4th). Damages**

The trial court erred by awarding defendants the bond posted by plaintiffs without having before it evidence that defendants had incurred any costs or damages arising from the injunction. **Tedder v. Alford**, 27.

INSURANCE**§ 11 (NCI4th). Trade practices, generally**

Plaintiffs' claim under the unfair insurance claim settlement statute was properly dismissed because the statute creates a cause of action only in favor of the Insurance Commissioner. **Johnson v. First Union Corp.**, 450.

Plaintiffs stated a claim for unfair or deceptive trade practices against defendant workers' compensation insurers where they alleged that defendants altered a Form 21 agreement and misrepresented plaintiffs' work duties to plaintiffs' physicians. **Ibid.**

§ 50 (NCI4th). Surplus lines insurance

A surplus lines insurance carrier was required by statute to get prior approval by the Department of Insurance for absolute pollution exclusion clauses in general liability

INSURANCE—Continued

ity policies issued for a manufacturing plant in this state. **Home Indemnity Co. v. Hoechst Celanese Corp.**, 226.

§ 474 (NCI4th). Automobile fire, theft, hail insurance; propriety of recovery for loss resulting from intentional act

The trial court properly granted summary judgment for defendant Regional Acceptance Corporation in a declaratory judgment action to determine plaintiff insurer's liability where plaintiff alleged that Regional held a security interest in the vehicle and was named as loss payee on plaintiff's policy, that the insured owner deliberately set fire to the vehicle, and that the intentional burning of the vehicle constituted a conversion or secretion excluded under the coverage provided. **Nationwide Mut. Ins. Co. v. Dempsey**, 641.

§ 518 (NCI4th). What constitutes uninsured vehicle

The trial court erred by granting defendant insurer's motion to dismiss where plaintiff was involved in an automobile accident with a police officer who was responding to a call, summary judgment was granted for the City and the officer, and defendant was plaintiffs' uninsured motorist insurer. Although there is a statutory restriction to persons who are legally entitled to recover damages, the statute also excepts from that exclusion vehicles owned by political subdivisions. **Williams v. Holsclaw**, 205.

§ 534 (NCI4th). Underinsured coverage; effect of consent judgment without notice to or consent of insured's underinsured motorist carrier

The trial court properly entered summary judgment for plaintiff's underinsured motorist carrier where plaintiff's attorney had provided only an oral notice of a settlement between plaintiff and defendant. **Williams v. Bowden**, 318.

§ 584 (NCI4th). Automobile insurance; coverage of lessees under rental company policy

A car rental company was not obligated by G.S. 20-281 to provide \$25,000 of primary liability coverage to a lessee for an accident that occurred while the lessee was driving the rental vehicle where the lessee had a valid liability policy for the minimum amount required by the Financial Responsibility Act. **Jeffreys v. Snappy Car Rental**, 171.

§ 631 (NCI4th). Automobile liability insurance; cancellation of coverage; effect of insurer's failure to give notice

The trial court did not err in an action arising from an automobile accident by granting summary judgment for third party plaintiffs against the defendant which issued a business automobile liability policy and the company which financed the premiums where the premium finance company did not comply with statutory requirements by waiting at least ten days after giving the insured notice of intent to cancel before mailing the insurer a request for cancellation. **Paris v. Woolard**, 416.

The trial court did not err by denying the third-party defendant's motion to file a supplemental affidavit in an action involving automobile insurance coverage where the third-party defendant financed the premiums but did not comply with the statutorily mandated ten day waiting period before sending a notice of cancellation to the insurer. **Ibid.**

INSURANCE—Continued**§ 895 (NCI4th). General liability insurance; what damages are covered**

Under the discovery rule, general liability policies provided no coverage for environmental contamination that was not discovered until after the policies expired. **Home Indemnity Co. v. Hoechst Celanese Corp.**, 189.

Failure of insurers to get advance approval from the Commissioner of Insurance for an absolute pollution exclusion clause in general liability policies did not render the clause void where the clause was subsequently approved for use. **Ibid.**

Spills or leaks which occurred on a regular or sporadic basis during the day-to-day operations of a polyester manufacturing plant over an extended period of time did not come within the "sudden and accidental" exception to the pollution exclusion clause. **Ibid.**

A fire at a polyester manufacturing plant did not constitute a sudden and accidental discharge that restored insurance coverage for pollution contamination where the fire caused only a de minimis amount of the total contamination. **Ibid.**

Failure of a surplus lines insurer to get prior approval from the Department of Insurance for absolute pollution exclusions in general liability policies for a polyester manufacturing plant in this state as required by statute did not render the pollution exclusions void where they were subsequently approved by the Department of Insurance. **Home Indemnity Co. v. Hoechst Celanese Corp.**, 226.

A clause in a general liability policy excluding coverage for damage "caused by seepage and/or pollution and/or contamination of air, land, water and/or any other property" was enforceable and excluded coverage for the clean-up of contamination of soil and groundwater by pollutants generated by the insured's polyester manufacturing plant. **Ibid.**

Named peril exceptions to absolute pollution exclusion clauses for fires, explosions, violent discharges, and railroad accidents did not restore coverage by the policies for the investigation and clean-up of contamination of soil and groundwater by pollutants generated by the insured's manufacturing plant where other provisos in the policies excluded coverage for costs of investigating and remediating environmental contamination. **Ibid.**

Under the discovery rule, coverage under general liability policies was not triggered by claims arising from environmental contamination where the leaching of contaminants occurred while the policies were in effect but the contamination damage was not discovered until after the policies expired. **Home Indemnity Co. v. Hoechst Celanese Corp.**, 259.

The discovery rule mandates that for insurance purposes, property damage occurs when it is manifested or discovered. **Ibid.**

§ 908 (NCI4th). Suits by or against particular persons or entities

The trial court correctly granted the third party defendants' motion to dismiss where an uninsured motorist carrier filed an answer in accordance with G.S. 20-279.21(b)(3)(a) and a third party complaint asking for indemnity or contribution. The statutory language granting the uninsured carrier the right to defend a suit must be construed using the plain meaning of the language in the statute and dictionaries define "defend" as contesting a claim or endeavoring to defeat a claim. Filing a third party complaint is an affirmative claim and not an action taken in an effort to defeat the original claim. **Hunter v. Kennedy**, 84.

INSURANCE—Continued**§ 1042 (NCI4th). Sufficiency of complaint; bad faith refusal to pay justifiable claim**

The trial court erred in dismissing plaintiffs' claims against defendant insurers for bad faith refusal to pay workers' compensation insurance benefits to plaintiffs where plaintiffs alleged that defendants materially altered a Form 21 agreement and produced an inaccurate video of plaintiffs' job duties to deceive plaintiffs' physicians that plaintiffs' injuries were not work-related. **Johnson v. First Union Corp.**, 450.

§ 1167 (NCI4th). Automobile insurance; permission of owner or insured to use vehicle generally

The trial court erred in a negligence action arising from an automobile collision by granting summary judgment for plaintiff and declaring that the insurance policy issued by Integon to defendant provided liability coverage where the policy excluded any person who used a vehicle without a reasonable belief of entitlement and defendant had been specifically told never to drive his father's Porsche. **Haney v. Miller**, 326.

§ 1182 (NCI4th). Automobile insurance; leased vehicles used in business

A bobtailing tractor was being used "in the business of" the lessee at the time of accident so that a non-trucking use endorsement in the lessee's liability policy applied to exclude coverage under that policy where the driver was acting under the lessee's instructions to drive the tractor to its terminal to pick up a shipment. **MGM Transport Corp. v. Cain**, 428.

§ 1300 (NCI4th). General liability insurance; sufficiency of evidence

The insured was bound by its admissions in response to an excess liability insurer's motion for summary judgment that the excess policies incorporated by reference the terms of a primary policy which was properly before the court and that this policy contains a pollution exclusion clause. **Home Indemnity Co. v. Hoechst Celanese Corp.**, 189.

There was insufficient evidence to support summary judgment for an excess liability insurer as to policies for which the insurer submitted no evidence of policy language and no evidence that these policies incorporated by reference the underlying primary policies. **Ibid.**

There was sufficient evidence of record to support entry of summary judgment in favor of an excess liability insurer as to noncoverage of environmental contamination claims where the insurer submitted declaration pages stating that its policies provided excess coverage by the terms of the underlying primary policy that was before the court, and the declaration pages were authenticated by the insurer's attorneys. **Ibid.**

INTENTIONAL MENTAL DISTRESS**§ 2 (NCI4th). Sufficiency of claim**

Plaintiff employees' complaint properly alleged intentional infliction of emotional distress for defendant insurers' refusal to pay an insurance claim. **Johnson v. First Union Corp.**, 450.

INTEREST AND USURY**§ 5 (NCI4th). Time from which interest runs**

The trial judge may award interest on child support accruing on the date the complaint was filed. **Taylor v. Taylor**, 180.

JUDGMENTS

§ 123 (NCI4th). What constitutes consent judgment

The trial court erred by incorporating in its final judgment the terms of a proposed consent judgment where, assuming that defendant had a duty under a settlement agreement to propose an implementation schedule and breached that duty by not presenting a proposal, that breach was not tantamount to consenting to terms which were not included in the agreement and which were specifically rejected by defendant. However, the court on remand may enter a judgment in accordance with the terms found in the agreement. **State ex rel. Howes v. Ormond Oil & Gas Co.**, 130.

§ 207 (NCI4th). Res judicata and collateral estoppel; identity of issues

The trial court did not err in a nuisance action in which Onslow County sought to hold the owners of adult establishments liable for violating public nuisance laws by denying defendants' motion to dismiss or abate under the theory of res judicata where there were pending federal and state actions but there was no identity of causes of action. **State ex rel. Onslow County v. Mercer**, 371.

§ 272 (NCI4th). What constitutes judgment on merits for res judicata or collateral estoppel; dismissal or nonsuit

The trial court correctly granted a motion for summary judgment based upon res judicata and/or collateral estoppel where a voluntary dismissal with prejudice in one of several previous actions was a final adjudication on the merits and there was a sufficient identification of the causes of action. **Caswell Realty Assoc. v. Andrews Co.**, 716.

§ 300 (NCI4th). Res judicata and collateral estoppel; preclusion of relitigation of issues; other particular proceedings

An action seeking a declaratory judgment that the mayor and city council members violated the Open Meetings Law in a gathering at one member's home was not barred on grounds of res judicata or collateral estoppel by a judgment in another plaintiff's prior action that sought only prospective relief concerning the same gathering of the defendants. **News and Observer Publishing Co. v. Coble**, 307.

§ 313 (NCI4th). Finality and validity of judgments; zoning

The State was not barred by the doctrine of collateral estoppel from bringing a claim against the owners of adult entertainment establishments where there were pending actions involving an adult zoning ordinance. The county could not have brought an action to abate a public nuisance at the time the prior action was commenced and the present action includes businesses not parties to the prior action. **State ex rel. Onslow County v. Mercer**, 371.

§ 530 (NCI4th). Standing to attack; person, not party, whose rights are affected by judgment

A nonparty may not seek relief under Rule 609 from a judgment which declared that an easement existed on the nonparty's land but must file an independent action attacking the judgment. **Watson v. Ben Griffin Realty and Auction**, 61.

§ 651 (NCI4th). Amount to which interest should be added

The trial court erred in a medical malpractice claim by awarding plaintiff pre-judgment interest on the full amount of the verdict where plaintiff had settled with another doctor and the hospital. **Brown v. Flowe**, 668.

JURY**§ 120 (NCI4th). Form of questions generally**

There was no prejudicial error in a prosecution for first-degree sexual offenses and taking indecent liberties where defendant was not allowed to ask prospective jurors if they felt that children were more likely to tell the truth when they made allegations of abuse. **State v. Hatfield**, 294.

§ 194 (NCI4th). Challenges for cause; grounds generally

There was no abuse of discretion in the excusal for cause of a prospective juror where defense counsel was the juror's brother-in-law. **State v. Exum**, 647.

§ 260 (NCI4th). Peremptory challenges; effect of racially neutral reasons for exercising challenges

The State was properly allowed to peremptorily challenge two African-American prospective jurors because one juror exhibited a general lack of attention and the second juror was young and lacked maturity. **State v. Caporasso**, 236.

KIDNAPPING AND FELONIOUS RESTRAINT**§ 14 (NCI4th). Sufficiency of evidence; degree of crime**

A kidnapping victim was not released in a safe place so that the charge was raised to first-degree kidnapping where defendant and his accomplice fled the scene when they were overpowered by the victim. **State v. Raynor**, 244.

§ 18 (NCI4th). Confinement, restraint, or removal as inherent feature of another felony

There was sufficient evidence of the element of restraint for submission of a charge of kidnapping to the jury where the evidence showed more than a mere technical asportation inherent in the commission of an armed robbery. **State v. Raynor**, 244.

§ 28 (NCI4th). Instructions to jury; confinement, restraint, or removal generally

There was no error in the trial court's instruction that defendant could be found guilty of first-degree kidnapping based upon "restraint or removal" when the indictment alleged only a theory of kidnapping based upon restraint of the victim. **State v. Raynor**, 244.

LABOR AND EMPLOYMENT**§ 90 (NCI4th). Interference with employee's obtaining other employment after termination**

The trial court erred by denying defendants' motion for judgment on the pleadings in an action alleging that a police chief intentionally interfered with plaintiff's employment opportunities in violation of G.S. 14-355, which clearly authorizes a cause of action for penal or punitive damages. Punitive damages may not be recovered against a municipality absent statutory authorization. **Houpe v. City of Statesville**, 334.

LABOR AND EMPLOYMENT—Continued**§ 120 (NCI4th). Employment discrimination; conciliation and deferral of discrimination charges**

The Office of Administrative Hearings had jurisdiction to hear an ESC employee's claim for retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964. **Employment Security Comm. v. Peace**, 1.

§ 121 (NCI4th). Employment discrimination; claimant's burden of proof

Plaintiff carries the initial burden of proof in a Title VII retaliatory discharge case; if plaintiff presents a prima facie case, defendant employer must articulate a legitimate nondiscriminatory reason for its action, and plaintiff must then show that the reason was only a pretext for the retaliatory action. **Employment Security Comm. v. Peace**, 1.

The Office of Administrative Hearings erred in placing the initial burden on defendant employer to show an absence of retaliatory purpose in a Title VII retaliatory discharge case prior to plaintiff employee's prima facie showing of a retaliatory discharge. **Ibid.**

§ 204 (NCI4th). Negligent hiring or retention

Claims by former church employees against a church and church organizations for negligent retention and supervision of a minister based upon sexual misconduct by the minister toward the former employees were not barred by the free exercise of religion clause of the First Amendment. **Smith v. Privette**, 490.

LARCENY**§ 110 (NCI4th). Defendant's possession of stolen property generally**

The trial court did not err by finding that a juvenile had committed larceny where a bank bag was stolen from a school office and the juvenile knew where the money was located and had possession of it soon after the theft. **In re Phillips**, 732.

§ 220 (NCI4th). Possession of stolen property; sufficiency of evidence

There was sufficient evidence that defendant knew or had reasonable grounds to believe that a gun in his possession was stolen so as to support submission of a charge of felonious possession of stolen property to the jury. **State v. Raynor**, 244.

LIBEL AND SLANDER**§ 26 (NCI4th). Absolute privilege; judicial or quasi judicial functions**

The trial court erred in an action arising from the dismissal of a police officer by denying defendants' motion for judgment on the pleadings regarding the officer's slander claim arising from grand jury testimony. **Houpe v. City of Statesville**, 334.

LIMITATIONS, REPOSE, AND LACHES**§ 45 (NCI4th). Loss of consortium**

Defendant's motion to dismiss a claim as being barred by the statute of limitations was properly denied where the claim was for loss of consortium due to plaintiff's spouse being injured in a construction accident. The statute of limitations would ordinarily have run, but the spouse's action was voluntarily dismissed without prejudice, which extended the time within which both claims could be asserted because the loss of consortium claim was derivative. **Sloan v. Miller Building Corp.**, 37.

LIMITATIONS, REPOSE, AND LACHES—Continued**§ 55 (NCI4th). Contract actions generally**

Claims by current or retired city employees for breach of a contract created when the city council passed an ordinance establishing a longevity pay plan accrued on the date the city council passed a resolution freezing the amount of annual longevity payments. **Liptrap v. City of High Point**, 353.

MORTGAGES AND DEEDS OF TRUST**§ 22 (NCI4th). Instruments securing future obligations**

The trial court properly dismissed a declaratory judgment action to determine lien priorities for failure to state a claim where the sale of lots was financed through a construction loan deed of trust which also secured future advances. Subsequent liens, even though recorded or filed prior to certain advances, are junior to all advances under the future advances deed of trust and plaintiffs' complaint contained no allegation that the security instruments failed to conform to statutory requirements. **Perry v. Carolina Builders Corp.**, 143.

MUNICIPAL CORPORATIONS**§ 37 (NCI4th). Validity of annexation statutes and procedures; as violating equal protection rights of residents**

Plaintiff's forecast of evidence was insufficient to support her claims that the exclusion of her property from annexation into defendant city was based upon intentional racial discrimination in violation of the Fourteenth Amendment to the U.S. Constitution pursuant to 42 U.S.C. § 1983 or Article I, § 19 of the N.C. Constitution. **Stephens v. City of Hendersonville**, 156.

§ 47 (NCI4th). Annexation; necessity of second public hearing

Summary judgment for defendant town on a challenge for an annexation ordinance was properly granted where the town passed an ordinance and then deleted some language and readopted the ordinance. There is no legal authority for the contention that the town had a duty to give notice of the rescission. **Chicora Country Club, Inc. v. Town of Erwin**, 101.

§ 58 (NCI4th). Annexation; test and relation to use, size, and population generally

The trial court erred by affirming an annexation ordinance where petitioners met their burden of showing by competent evidence that the Town failed to comply with the subdivision test requirement. **American Greetings Corp. v. Town of Alexandria Mills**, 727.

§ 123 (NCI4th). Attack on annexation or annexation proceedings; grounds for attack generally

The trial court did not err by dismissing for lack of jurisdiction a petition for review of an annexation ordinance where the petition was not timely filed. **Chicora Country Club, Inc. v. Town of Erwin**, 101.

§ 129 (NCI4th). Sufficiency of petition attacking annexation ordinance, generally

The trial court did not err by granting summary judgment for defendant on a petition attacking an annexation ordinance where the ordinance was readopted after certain language was removed, a second petition was filed, and the court had before it no

MUNICIPAL CORPORATIONS—Continued

issues upon which to rule on the first petition because the first ordinance had been rescinded before being readopted. **Chicora Country Club, Inc. v. Town of Erwin**, 101.

§ 130 (NCI4th). Sufficiency of petition attacking annexation ordinance; amendment of pleadings

The trial court did not abuse its discretion in denying a motion to amend a petition to review an annexation ordinance where the amendment was to include review of the re-adoption of the ordinance after certain language was amended. The court's decision was a reasoned one to prevent unfair prejudice to the town. **Chicora Country Club, Inc. v. Town of Erwin**, 101.

§ 360 (NCI4th). Personnel matters

The trial court erred in an action arising from the dismissal of a police officer by denying defendants' motion for judgment on the pleadings relating to an alleged violation of G.S. 160A-168, which does not create a civil cause of action. **Houpe v. City of Statesville**, 334.

§ 413 (NCI4th). Tort liability; governmental functions

The actions of the City and its officials in investigating and disciplining a police officer accused of criminal activity were "governmental functions" for governmental immunity purposes. **Houpe v. City of Statesville**, 334.

The trial court erred in an action arising from a police officer's dismissal by denying defendants' motion for judgment on the pleadings as to the claim that defendants conspired to deprive plaintiff of employment. A municipal corporation cannot in its sovereign or municipal capacity be a party to a conspiracy. **Ibid.**

§ 445 (NCI4th). Waiver of governmental immunity; extent of waiver

The trial court did not err by granting summary judgment for defendant City and a police officer in his official capacity in a negligence action arising from an automobile accident where plaintiff sought damages of less than \$1,000,000 and the City had purchased liability insurance for claims between \$1,000,000 and \$10,000,000. **Williams v. Holsclaw**, 205.

§ 445 (NCI4th). Effect of procuring liability insurance; extent of waiver

The trial court did not err in denying defendants' motion for judgment on the pleadings in an action by a police officer for wrongful termination where one of the City's two insurance clauses excluded emotional distress and mental anguish and plaintiff admitted in interrogatories that he sought recovery on those bases. **Houpe v. City of Statesville**, 334.

Governmental immunity was not waived by the City's purchase of two insurance policies on claims for libel and slander per se where one policy excludes claims for libel and slander and the other excludes coverage for employment related defamation. **Ibid.**

The trial court properly denied defendants' motion for judgment on the pleadings as to plaintiff police officer's malicious prosecution and false arrest claims where the claims were not precluded by governmental immunity based on an insurance exclusion. **Ibid.**

The trial court did not err by denying defendants' motion for judgment on the pleadings on a claim for negligent supervision and negligent retention where governmental immunity was not waived. **Ibid.**

MUNICIPAL CORPORATIONS—Continued**§ 453 (NCI4th). Pleadings generally**

The trial court erred in an action arising from the dismissal of a police officer by denying defendants' motion for judgment on the pleadings as to breach of contract claims with respect to the individual defendants where plaintiff alleged that the City and not the individuals had hired him. **Houpe v. City of Statesville**, 334.

NEGLIGENCE**§ 82 (NCI4th). Sufficiency of pleadings; contributory negligence**

The trial court did not err in a negligence action arising from a three-story fall at a construction site by denying defendant's motion for a directed verdict on the issue of plaintiff's willful or wanton contributory negligence. Defendant pled only contributory negligence and set forth no allegations sufficient to give notice that it was asserting willful or wanton contributory negligence. **Sloan v. Miller Building Corp.**, 37.

§ 127 (NCI4th). Willful and wanton negligence; sufficiency of evidence

The trial court did not err in a negligence action arising from an injury at a construction site by denying defendant's motion for directed verdict on the issue of willful or wanton negligence. **Sloan v. Miller Building Corp.**, 37.

§ 152 (NCI4th). Premises liability involving floors

The trial court did not err by denying summary judgment for defendants on its own negligence or on plaintiff's contributory negligence in a slip and fall in a store on a rainy day. **Smith v. Wal-mart Stores**, 282.

§ 169 (NCI4th). Willful and wanton conduct; instructions

The trial court did not err in a negligence action arising from an injury at a construction site by instructing the jury that it was sufficient to find that defendant's conduct was willful or wanton; it is not required that the jury find a defendant's conduct to be both willful and wanton to overcome the bar of contributory negligence. **Sloan v. Miller Building Corp.**, 37.

§ 176 (NCI4th). Intervening cause; concurring negligence; instructions

The trial court did not err in a negligence action arising from a three-story fall at a construction site by refusing defendant's requested instruction on insulating negligence where the evidence did not support that instruction. **Sloan v. Miller Building Corp.**, 37.

NUISANCE**§ 4 (NCI4th). Private nuisances; particular examples**

The trial court did not err by directing a verdict against plaintiffs in an action for an injunction arising from a proposed fence on the issue of whether the fence was a "spite fence." There was evidence to support the conclusion that the decision to erect a fence stemmed from defendants' desire to secure their property and there was no evidence to support the conclusion that displeasure with plaintiffs for being unwilling to buy defendants' property at their desired price dictated the decision to erect a fence. Moreover, the proposed fence is a standard chain link fence which lets in both light and air and is identical to a fence already surrounding the property. **Tedder v. Alford**, 27.

PARTNERSHIP

§ 22 (NCI4th). Actions by limited partners against third parties

A limited partnership agreement's specific authorization of derivative suits by the limited partner controlled over the general requirement in the agreement for management committee approval for litigation. **Tohato, Inc. v. Pinewild Management, Inc.**, 386.

PHYSICIANS, SURGEONS, AND OTHER HEALTH CARE PROFESSIONALS

§ 96 (NCI4th). Liability of primary physician for those assisting him

The trial court did not err in a medical malpractice action by granting a directed verdict for plaintiff on the issue of defendant's vicarious liability. **Brown v. Flowe**, 668.

PLEADINGS

§ 61 (NCI4th). Sanctions generally

The trial court erred by issuing Rule 11 sanctions against the client in a domestic action where the attorney admitted that the client relied on his advice as to the legal and factual sufficiencies of the action. **Taylor v. Collins**, 46.

§ 63 (NCI4th). Imposition of sanctions in particular cases

The imposition of Rule 11 sanctions against the attorney for a husband in a domestic action was not untimely and barred by res judicata and judicial economy. It is proper for a trial court to consider Rule 11 sanctions without regard to whether the adversary proceedings are continuing when the motion is filed and there is no authority that it was error to entertain the motion after the appeal. **Taylor v. Collins**, 46.

The imposition of Rule 11 sanctions against an attorney was upheld where the client and his wife had signed a separation agreement which included a mutual release and the attorney subsequently signed a complaint for abuse of process, emotional distress, and other claims arising from the divorce proceedings. **Ibid.**

A portion of an order imposing Rule 11 sanctions was reversed where the complaint and supporting affidavit contain sufficient allegations susceptible of proof. Plaintiffs' attorney made an objectively reasonable inquiry into the facts and existing law by obtaining an expert opinion and relying on a North Carolina Supreme Court opinion. **Page v. Roscoe, LLC**, 678.

A portion of an order imposing Rule 11 sanctions was remanded for further consideration of appropriate sanctions where the complaint improperly named an individual member of a limited liability company as a party defendant without supporting evidence, but defense counsel conceded that naming that party as an individual defendant did not require additional time and research. **Ibid.**

§ 64 (NCI4th). Attorneys' fees as sanction; amount of award

The trial court did not abuse its discretion by requiring that Rule 11 sanctions be paid within thirty days. **Taylor v. Collins**, 46.

§ 107 (NCI4th). Defense of failure to state claim generally

The trial court erroneously granted defendant's 12(b)(6) motion to dismiss plaintiff's amended complaint based on consideration of evidence outside the pleadings. **Jacobs v. Royal Ins. Co. of America**, 528.

PLEADINGS—Continued**§ 362 (NCI4th). Amended and supplemental pleadings generally**

There was no error in a declaratory judgment action to determine automobile insurance coverage in allowing the insurer to amend its pleadings to add a cross-claim against an insurance premium finance company. **Paris v. Woolard**, 416.

§ 378 (NCI4th). Amended and supplemental pleadings; relating to parties

In a negligence action resulting from damage to plaintiff's building, the trial court did not err by denying plaintiff's motion to amend her complaint to add a defendant. **Wicker v. Holland**, 524.

PRODUCTS LIABILITY**§ 21 (NCI4th). Defenses; modification of product by one other than manufacturer**

In an action to recover for personal injuries received by the minor plaintiff while playing on a gate constructed by defendant on school grounds, summary judgment was improperly entered for defendant on the ground that the minor plaintiff used the gate in a manner for which it was not designed or intended. **Hastings v. Seegars Fence Co.**, 166.

PUBLIC OFFICERS AND EMPLOYEES**§ 35 (NCI4th). Personal liability; negligence**

The trial court properly granted summary judgment in favor of defendant law enforcement officer in his individual capacity in a negligence claim arising from an automobile accident where it was undisputed that defendant's actions fell within the scope of his official discretion as a police officer and plaintiffs advanced no allegations of corruption or malice. **Williams v. Holsclaw**, 205.

§ 63 (NCI4th). State personnel system; grievances and grievance procedures generally

A county DSS was required to state the specific reasons why it did not adopt the recommended decision of the State Personnel Commission to reinstate petitioner and to serve a copy of its final decision on the petitioner, but it was not obligated to enter findings of fact and conclusions of law. **Cunningham v. Catawba County**, 70.

§ 66 (NCI4th). State personnel system; disciplinary actions involving career state employees

A state employee has a property interest in continued employment protected by due process. **Employment Security Comm. v. Peace**, 1.

The employer has the initial burden to produce evidence that a state employee was dismissed for just cause, and the employee must then come forward with evidence that his or her dismissal was without just cause. **Ibid.**

Placing the burden of proof on the state employee in determining whether the employee was dismissed for just cause does not violate due process. **Ibid.**

RAPE AND ALLIED SEXUAL OFFENSES

- § 116 (NCI4th). Sufficiency of evidence to show act was accomplished by force and against will of victim**

The trial court did not err by denying defendant's motion to dismiss charges of second-degree sexual offense where there was sufficient evidence of force. **State v. Jacobs**, 559.

RECORDS OF INSTRUMENTS, DOCUMENTS, OR THINGS

- § 1 (NCI4th). Public records defined**

The records of a closed session of the UNC-CH Undergraduate Court may be withheld from public inspection where a closed session was authorized under statute. **DTH Publishing Corp. v. UNC-Chapel Hill**, 534.

ROBBERY

- § 66 (NCI4th). Sufficiency of evidence where weapon was firearm**

There was sufficient evidence that defendant threatened to use a gun to support his conviction of armed robbery. **State v. Lee**, 506.

SCHOOLS

- § 70 (NCI4th). Local school budget generally**

The trial court did not err in an action arising from a dispute over the distribution of residual sales tax funds to county and city school systems by concluding that there is no conflict between a statute involving the ad valorem method of distribution and another statute which involves apportionment by membership of each unit. **Banks v. County of Buncombe**, 214.

- § 147 (NCI4th). Teacher enhancement program**

The trial court erred by granting defendant's motion for summary judgment in a class action brought by teachers employed by the County who had obtained career status under the Career Development Pilot Program but who alleged that the Board failed to comply with the statutory mandate and pay the salary and supplements to which they were entitled when the General Assembly discontinued the CDPP and put into place a new career development program. **Williams v. Alexander County Bd. of Educ.**, 599.

SEARCHES AND SEIZURES

- § 45 (NCI4th). Search of clothing and personal effects incident to arrest**

Even if defendant's detention in a patrol car was an unlawful arrest, officers lawfully seized his overcoat and gunshot residue from his hand after his lawful arrest at the sheriff's office based upon probable cause. **State v. Dammons**, 16.

SECURED TRANSACTIONS

- § 8 (NCI4th). Chattel mortgages; conditional sales**

The trial court erred by granting summary judgment for plaintiffs on the issue of commercial reasonableness of the sale of leased cash register equipment following defendants' default where plaintiffs repurchased the equipment, re-leased some of it,

SECURED TRANSACTIONS—Continued

and sought to recover the accelerated balance under the original lease minus the net proceeds of the sale. **Coastal Leasing Corp. v. T-Bar Corp.**, 379.

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS**§ 13 (NCI4th). Civil liability generally**

In an action resulting from the death of plaintiffs' son, plaintiffs' complaint failed to state a claim against defendant police officers in their individual capacities and should have been dismissed based on the doctrine of public officer immunity. **McCarn v. Beach**, 435.

§ 23 (NCI4th). Civil rights violations

The trial court erred in not granting a highway patrol trooper's motion for summary judgment based on qualified immunity in a § 1983 claim which arose from a traffic stop where a reasonable person in the trooper's position would not have known that his actions violated a clearly established right and he was therefore entitled to the defense of qualified immunity. **Rousselo v. Starling**, 439.

§ 31 (NCI4th). North Carolina Sheriffs' Education and Training and Standards Commission

The trial court correctly reversed the N.C. Sheriffs' Education and Training Standards Commission where plaintiff received a prayer for judgment continued for a misdemeanor obstruction of justice charge arising from perjury allegations in a divorce proceeding and the Commission revoked her certification. A conviction occurs only when there is an entry of judgment and the issuance of a p.j.c. does not constitute the entry of judgment. **Britt v. N.C. Sheriffs' Educ. and Training Standards Comm.**, 81.

STATE**§ 9 (NCI4th). Open meetings law**

G.S. 143-318.16B does not apply to permit an award of attorney fees to defendants in an action for a declaratory judgment under the Open Meetings Law where defendants are no longer the prevailing party. **News and Observer Publishing Co. v. Coble**, 307.

§ 10 (NCI4th). Open meetings; meetings held in executive session

The trial court did not err in its determination that the UNC-CH Undergraduate Court is a public body, or by ruling that the Undergraduate Court was authorized to close its proceedings. **DTH Publishing Corp. v. UNC-Chapel Hill**, 534.

§ 27 (NCI4th). Entry into contract as implied consent to suit

The trial court did not err in denying defendants' motion for judgment on the pleadings as to a breach of contract claim where the complaint alleged that the City's charter, ordinances, and written policies created an agreement; sovereign immunity is not applicable to breach of contract claims and whether the charter, ordinances, and written policies became part of the contract is not an issue properly adjudicated on the pleadings. **Houpe v. City of Statesville**, 334.

§ 35 (NCI4th). Tort Claims Act; standard of care

The trial court did not err in a Tort Claims action by affirming the Industrial Commission's conclusion that defendant's negligence was the proximate cause of plaintiff's

STATE—Continued

injuries where DOT owed plaintiff a duty to provide a safe work environment because plaintiff's work was inherently or intrinsically dangerous in that it could be performed safely with certain precautions but would cause injuries if those precautions were omitted. **Simmons v. N.C. Dept. of Transportation**, 402.

§ 36 (NCI4th). Tort Claims Act; proximate cause; contributory negligence

The North Carolina Industrial Commission did not err by concluding that plaintiff-welder was not contributorily negligent in a Tort Claims action arising from an explosion on a DOT asphalt storage tank where the Commission's conclusion was justified by findings supported by competent evidence that plaintiff used a gas detection device but omitted a required vapor seal. **Simmons v. N.C. Dept. of Transportation**, 402.

§ 55 (NCI4th). Tort Claims Act; sufficiency of evidence; other types of actions

The Industrial Commission did not err in a Tort Claims action arising from an explosion which injured a welder by finding and concluding that a proximate cause of plaintiff's injury was the negligence of a DOT employee. **Simmons v. N.C. Dept. of Transportation**, 402.

TAXATION**§ 27 (NCI4th). Exemption of particular properties and uses generally**

A taxpayer's application for an exemption for recycling and resource recovery equipment was timely filed in substantial compliance with G.S. 105-282.1, although it was not filed on the approved form, where the taxpayer's listing for the year set forth its intent to claim the exemption and provided the pertinent information, and the county received a certification from DEHNR that the taxpayer's property qualified for the exemption. **In re Appeal of Valley Proteins, Inc.**, 151.

§ 82 (NCI4th). Valuation of real property generally

The property owners sufficiently met their burden of producing competent, material and substantial evidence to show that respondent used an arbitrary and illegal valuation method in appraising property and adequately rebutted the presumption of correctness. **In re Allred**, 604.

§ 97 (NCI4th). Duties of boards of equalization and review

The Property Tax Commission was not bound by the restrictions of G.S. 105-287(b) in considering Randolph County's appeal from the County Board of Equalization and Review's order reducing a property tax appraisal. **In re Allred**, 604.

§ 114 (NCI4th). Corporate income taxes generally

The phrase "and includes" in G.S. 105-130.4 does not create a separate definition of business income but merely provides examples of what fits within the definition of business income. **Polaroid Corp. v. Offerman**, 422.

Damages awarded to plaintiff in its patent infringement suit against a competitor is nonbusiness income rather than business income under G.S. 105-130.4 for income tax purposes. **Ibid.**

§ 145 (NCI4th). Local government sales and use tax

The trial court did not err in an action arising from a dispute over the distribution of residual sales tax funds between county and city school systems by con-

TAXATION—Continued

cluding that G.S. 105-472(b)(2) was not repealed by G.S. 115C-424. **Banks v. County of Buncombe**, 214.

The trial court did not err in an action arising from a dispute over the distribution of residual sales tax funds between county and city school systems by concluding that G.S. 115C-430 did not govern distributions of the residual sales taxes to the current expense funds of each district. **Ibid.**

§ 208 (NCI4th). Tax liens on realty

County ad valorem tax liens under the Machinery Act have priority over State tax liens under the Revenue Act even when the State tax lien is docketed in advance of the county lien. **County of Carteret v. Long**, 477.

TIME OR DATE**§ 19 (NCI4th). Enlargement or extension of time in civil actions**

Even if petitioner could demonstrate that a petition for review of an annexation ordinance was untimely filed due to excusable neglect, the trial court had no authority under Rule 6 to extend the time because Rule 6 is limited to those time periods prescribed by the Rules of Civil Procedure and the thirty day time limitation here is a mandate set forth by the legislature by statute. **Chicora Country Club, Inc. v. Town of Erwin**, 101.

TRESPASS**§ 6 (NCI4th). Defenses to civil trespass**

A sewer line installed by defendants under a roadway on plaintiffs' land was not installed under a claim of right so as to defeat plaintiffs' action for trespass because a permit for a sewer line had been issued by the county health department. **Moore v. Leveris**, 276.

TRIAL**§ 13 (NCI4th). Continuances; discretion to grant or deny continuance**

The trial court did not abuse its discretion by denying a motion to continue. **Caswell Realty Assoc. v. Andrews Co.**, 716.

§ 67 (NCI4th). Materials considered on motion for summary judgment generally

The insured was estopped from denying the authenticity of liability policies and endorsements relied upon by the insurer to support its motion for summary judgment where the policies and endorsements were produced by the insured's broker in response to discovery requests and were attached to the verified affidavit of the insurer's attorney. **Home Indemnity Co. v. Hoechst Celanese Corp.**, 226.

§ 68 (NCI4th). Materials considered on motion for summary judgment; admissions in pleadings of opposing party

The insured was bound by its admissions in response to an excess liability insurer's motion for summary judgment that the excess policies incorporated by reference the terms of a primary policy which was properly before the court and that this policy contains a pollution exclusion clause. **Home Indemnity Co. v. Hoechst Celanese Corp.**, 189.

TRIAL—Continued**§ 75 (NCI4th). Materials considered on motion for summary judgment; affidavits; personal knowledge requirement**

Affidavits of attorneys of excess liability insurers based upon their personal knowledge were competent to authenticate the excess policies for purposes of summary judgment. **Home Indemnity Co. v. Hoechst Celanese Corp.**, 189.

The verified affidavit of the insurer's attorney stating that insurance policies and endorsements had been produced by the insured and its broker in response to a deposition subpoena was sufficient to authenticate the policies and endorsements for summary judgment purposes. **Home Indemnity Co. v. Hoechst Celanese Corp.**, 226.

§ 87 (NCI4th). Summary judgment; credibility of witnesses

Summary judgment was inappropriate where the insured died from a knife wound suffered in a fight with the beneficiary and the insurer filed this action to determine who was rightfully entitled to the proceeds. Plaintiff is interested in the outcome of the case and the facts surrounding the death of the insured are peculiarly within her knowledge. **State Farm Life Ins. Co. v. Allison**, 74.

§ 475 (NCI4th). Compromise verdicts; quotient verdicts

Evidence that the jury verdict was one-half of the amount sought by plaintiff was insufficient to show that the jury reached a quotient verdict. **Gram v. Davis**, 484.

§ 555 (NCI4th). New trial; misconduct of jury generally

A juror's affidavit that damages awarded to the minor plaintiff for injuries received in an automobile accident were influenced by the fact that some jurors were of the opinion that the minor plaintiff's parents were partly at fault for the severity of her injuries because she was not in a child safety seat provides no basis for a new trial on the damages issue on grounds of juror misconduct, jury disregard of the court's instructions, or an award resulting from passion or prejudice. **Fenz v. Davis**, 621.

TRUSTS AND TRUSTEES**§ 152 (NCI4th). Nature and purpose of constructive trust**

The trial court did not improperly impose a constructive trust on improvements to the marital home in an equitable distribution action. **Weatherford v. Keenan**, 178.

§ 170 (NCI4th). Transactions involving spouses

The trial court did not err by determining on remand that the evidence clearly and convincingly established facts giving rise to a constructive trust in an equitable distribution action where all but one finding was supported by competent evidence. **Upchurch v. Upchurch**, 461.

UNFAIR COMPETITION OR TRADE PRACTICES**§ 28 (NCI4th). Sufficiency of complaint**

A claim for unfair or deceptive trade practices by a real estate seller and subordinate lienholder against the superior lienholder and lender arising from the application of loan proceeds was properly dismissed for insufficient factual allegations. **Perry v. Carolina Builders Corp.**, 143.

§ 30 (NCI4th). Sufficiency of particular allegations

Plaintiff did not state a claim for violation of the unfair and deceptive practices act arising from a promotional campaign with a Ford pick-up truck as the contest

UNFAIR COMPETITION OR TRADE PRACTICES—Continued

grand prize where plaintiff merely contended that defendants breached a contract by failing to award him the truck and did not allege any aggravating circumstances. **Jones v. Capitol Broadcasting Co.**, 271.

§ 42 (NCI4th). Evidence of damages

There was no merit to defendants' contention that plaintiff-buyers failed to present sufficient evidence of causation to require submission of damages to the jury on an unfair and deceptive trade practice claim arising from the attempted purchase of a lot which was reduced in size after the purchase contract was signed. **Edwards v. West**, 570.

§ 43 (NCI4th). Sufficiency of evidence to support jury verdict or trial court's findings generally

The trial court did not err by denying defendants' motion for a directed verdict on an unfair or deceptive trade practice claim arising from the attempted sale of a lot where the acreage of the lot was reduced before closing and defendants did not plan to tell plaintiffs about the reduction until closing. **Edwards v. West**, 570.

§ 54 (NCI4th). Findings necessary to support award of attorney's fees

There was ample evidence to support an award of attorney's fees where plaintiffs changed a plat to reduce the acreage of a lot after plaintiffs signed a purchase contract. **Edwards v. West**, 570.

UTILITIES**§ 27 (NCI4th). Natural gas facilities; compelling creation of expansion fund**

The Utilities Commission could give the greatest weight to an applicant's plan to use traditional funding rather than expansion funds in deciding between competing applications to provide natural gas service to an unfranchised area. **State ex rel. Utilities Comm'n v. N.C. Gas Service**, 288.

§ 48 (NCI4th). Certificates of public convenience and necessity generally

The Utilities Commission's order granting Piedmont's application and denying N.C. Gas's application to provide natural gas service to a portion of Stokes County facilitates natural gas expansion in unserved areas pursuant to G.S. 62-36A. **State ex rel. Utilities Comm'n v. N.C. Gas Service**, 288.

The Utilities Commission could give the greatest weight to an applicant's plan to use traditional funding rather than expansion funds in deciding between competing applications to provide natural gas service to an unfranchised area. **Ibid.**

§ 54 (NCI4th). Suspension or revocation of utility franchise

The fact that a natural gas supplier was awarded a franchise for Forsyth County decades ago is insufficient to show a change of circumstances requiring a rescission of the supplier's franchise. **State ex rel. Utilities Comm'n v. N.C. Gas Service**, 288.

§ 265 (NCI4th). Weight and sufficiency of evidence; conflicting testimony or other evidence

A finding by the Utilities Commission that it was not in the public interest for the City of King to have two natural gas suppliers was supported by substantial evidence, although the evidence was conflicting. **State ex rel. Utilities Comm'n v. N.C. Gas Service**, 288.

WORKERS' COMPENSATION**§ 57 (NCI4th). Applicability of exclusivity of remedy provision**

The exclusive remedy doctrine did not apply to bar plaintiffs' civil action for acts of fraud allegedly committed in the handling of plaintiffs' workers' compensation claims. **Johnson v. First Union Corp.**, 450.

Alleged fraudulent conduct by defendant employer in the settlement of plaintiffs' workers' compensation claims did not fall within the scope of the employer-employee relationship governed by the Workers' Compensation Act, and plaintiffs were thus not barred from bringing actions under the unfair trade practices statute based upon such alleged fraud. **Ibid.**

§ 85 (NCI4th). Disbursement of proceeds of settlement

The trial court had discretion to eliminate the employer's workers' compensation lien on settlement proceeds in a wrongful death action arising from the death of a DOT employee. **U.S. Fidelity and Guaranty Co. v. Johnson**, 520.

The trial court properly exercised its discretion pursuant to statute in denying an employer's lien for workers' compensation benefits paid to the estate of a DOT employee where the court's order was supported by its findings, conclusions, and applicable law. **Ibid.**

§ 104 (NCI4th). Other issues within jurisdiction of Industrial Commission

Plaintiffs' civil actions arising from the allegedly fraudulent handling of their workers' compensation claims will be stayed under the doctrine of primary jurisdiction pending the Industrial Commission's determination of plaintiffs' underlying workers' compensation claims. **Johnson v. First Union Corp.**, 450.

§ 235 (NCI4th). Existence of disability; presumptions arising from employee's return, or failure to return, to work

Evidence that plaintiff was released by his doctors to return to work did not rebut the presumption from the entry of a Form 21 agreement for temporary total disability that plaintiff's disability continues until he returns to work at the same wage he was earning prior to his injury. **Harrington v. Adams-Robinson Enterprises**, 496.

§ 297 (NCI4th). Refusal to accept suitable employment

Plaintiff, who was injured while working as a city police officer II, was justified in refusing the city's offer of a water meter reader trainee position and thus was not barred by G.S. 97-32 from receiving further disability compensation where plaintiff was offered the same salary as her police officer II salary but without a similar opportunity for income advancement, and there was no evidence that another employer would hire plaintiff for a similar position at a comparable wage level. **Dixon v. City of Durham**, 501.

§ 353 (NCI4th). Time limit for filing claims for occupational disease

The two-year period within which a claim for benefits for an occupational disease must be filed begins when an occupational disease renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity, and the employee is informed by competent medical authority of the nature and work-related cause of the disease. **Howard v. Square-D Co.**, 303.

The two-year period for plaintiff to file a claim for disability benefits for carpal tunnel syndrome did not begin when she took a leave of absence for six days after being informed by her doctor that she had this occupational disease but commenced at a subsequent time when plaintiff was unable to earn wages for four weeks. **Ibid.**

WORKERS' COMPENSATION—Continued**§ 415 (NCI4th). Reconsideration of findings or fact and conclusions of law**

The Industrial Commission erred by reversing a deputy commissioner's ruling on credibility on a cold record without first acknowledging that the deputy commissioner was in a better position to judge the credibility of a witness and without findings revealing the basis for rejecting the deputy commissioner's findings of credibility. *Holcomb v. Pepsi Cola Co.*, 323.

ZONING**§ 41 (NCI4th). Validity and application of particular restrictions on location of manufactured home**

The approval by county commissioners of an application to rezone plaintiffs' land from a classification allowing manufactured home parks to a classification prohibiting manufactured home parks except on a conditional use basis was arbitrary and capricious and invalid. *Gregory v. County of Harnett*, 161.

§ 49 (NCI4th). Nonconforming uses; restoration of nonconforming structure

The evidence did not support a town board of adjustment's decision that a billboard was destroyed in a storm and as a nonconforming use could not be reconstructed under the town's zoning ordinance but showed that the billboard was merely damaged and in need of repairs as permitted by the zoning ordinance. *Appalachian Outdoor Advertising Co. v. Town of Boone Bd. of Adjust.*, 137.

§ 52 (NCI4th). Extension of nonconforming use; enlargement of structure

There was substantial evidence to support the Greensboro Board of Adjustment's finding that a former restaurant was being used as an adult mini motion picture theater which contained viewing booths showing a preponderance of adult motion pictures and that this was an impermissible enlargement or extension of a nonconforming use. *Fantasy World, Inc. v. Greensboro Bd. of Adjustment*, 703.

§ 89 (NCI4th). Constitutional challenges; vagueness

A Greensboro ordinance restricting adult entertainment businesses was not unconstitutionally vague where the ordinance referred to mini motion picture booths showing a "preponderance" of motion pictures characterized by sexual activities. *Fantasy World, Inc. v. Greensboro Bd. of Adjustment*, 703.

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